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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM ALLEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is information that a suspect is carrying a gun irrelevant to the reasonable suspicion analysis under *Terry v. Ohio*?

(Answered in the affirmative by the Supreme Court of Pennsylvania).

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Orders and Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 3

Reasons for Granting the Writ 6

A REPORT OF A MAN WITH A GUN SHOULD PERMIT A *TERRY* STOP; THIS COURT SHOULD ADDRESS THE EMERGING THEORY THAT A REPORT OF A GUN IS IRRELEVANT 6

Conclusion 18

Appendix

Judgment and opinion of the Supreme Court of Pennsylvania ..... App. 1

Judgment and opinion of the Superior Court of Pennsylvania ..... App. 17

Statement in lieu of opinion of the Court of Common Pleas of Philadelphia (suppression court) ..... App. 31

Findings of fact and conclusions of law of the Court of Common Pleas of Philadelphia (suppression court) ..... App. 32

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972) 6

Ornelas v. United States, 116 S. Ct. 1657 (1996) 6

Terry v. Ohio, 392 U.S. 1 (1968)..... *passim*

United States v. Bold, 19 F.3d 99 (2d Cir. 1994)...10, 11

United States v. Bold, 825 F. Supp. 25 (E.D.N.Y. 1993).....11, 12

United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993)..... 12

United States v. Cortez, 449 U.S. 411 (1981) 6

United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996)..... 14

United States v. Fernandez, 943 F. Supp. 295 (S.D.N.Y. 1996) 10, 12

United States v. Gibson, 64 F.3d 617 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996)..... 14

United States v. Holland, 510 F.2d 453 (9th Cir.), *cert. denied*, 422 U.S. 1010 (1975) 13

United States v. McBride, 801 F.2d 1045 (8th Cir. 1986), *cert. denied*, 479 U.S. 1100 (1987)..... 13

United States v. Roberson, 90 F.3d 75 (3d Cir. 1996) 9

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Allen v. State, 85 Md. App. 657, 584 A.2d 1279 (1991) 15

Commonwealth v. Alvarado, 423 Mass. 266, 667 N.E.2d 856 (1996) 8, 12

Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068 (1997) 6, 7, 8, 10, 12, 17

Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969) 2

Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997) 2, 7, 12

Commonwealth v. Morris, 537 Pa. 417, 644 A.2d 721 (1994) 2

In the matter of J.L.G., 209 Ga. 565, 434 S.E.2d 126 (1993) 15

J.L. v. State, 727 So. 2d 204 (Fla. 1998) 8, 12, 17

People v. D.F., 933 P.2d 9 (Colo. 1997) 15

People v. Salaman, 71 N.Y.2d 869, 527 N.Y.S.2d 750, 522 N.E.2d 1048 (1988) 15

People v. Smithers, 83 Ill. 2d 430, 415 N.E.2d 332 (1980) 14

Scott v. Virginia, 20 Va. App. 725, 460 S.E.2d 610 (1995) 15

State In The Interest Of H.B., 75 N.J. 243, 381 A.2d 759 (1977) 14

TABLE OF AUTHORITIES – Continued

Page

State v. Blackman, 94 Md. App. 284, 617 A.2d 619 (1992) 16

State v. Franklin, 41 Wash. App. 409, 704 P.2d 666 (1985) 15

State v. Hasenbank, 425 A.2d 1330 (Me. 1981) 14

State v. Kuahuia, 62 Haw. 464, 616 P.2d 1374 (1980) 14

State v. Pulley, 863 S.W.2d 29 (Tenn. 1993) 15

STATUTES

28 U.S.C. § 1257(a) 2

MISCELLANEOUS

LaFave, *Search and Seizure* (West, 1987) 16

ORDERS AND OPINIONS BELOW

The February 26, 1999, order and opinion of the Supreme Court of Pennsylvania is reproduced at App. 1. The July 17, 1996, order of the Superior Court reversing the order of suppression is reproduced at App. 17. The findings of fact and conclusions of law of the suppression court, the Court of Common Pleas of Philadelphia, is reproduced at App. 32.

STATEMENT OF JURISDICTION

This is a state criminal prosecution in which respondent filed a motion to suppress cocaine in the trial court, the Philadelphia Court of Common Pleas, on the ground that it was seized in violation of the Fourth Amendment of the United States Constitution. On May 12, 1995, the trial court granted suppression.

Petitioner, the Commonwealth of Pennsylvania, appealed to the intermediate state appellate court, the Superior Court of Pennsylvania, which reversed the suppression ruling on July 17, 1996. Respondent filed a petition for reargument which was denied by the Superior Court on September 19, 1996. Respondent then filed a petition for allowance of appeal in the Supreme Court of Pennsylvania, which the Court granted. After briefing and oral argument the Pennsylvania Supreme Court, on February 26, 1999, reversed the decision of the Superior Court. It held that the Fourth Amendment did not permit a stop and frisk where a citizen told the police that drugs were being sold in front of her house by a suspect who was "known to carry a gun," and when the police went to

investigate the suspect had a large bulge in his front left pocket.

The opinion of the Pennsylvania Supreme Court refers to both the Fourth Amendment and the similarly-worded Article I, § 8 of the state constitution. However, the opinion includes no plain statement that the decision was based on an independent state ground. More importantly, the Pennsylvania Supreme Court has repeatedly held that, in the area of stop and frisk, the state constitution is entirely coextensive with the Fourth Amendment. *Commonwealth v. Jackson*, 584 Pa. 484, 698 A.2d 571, 573 (1997); *Commonwealth v. Morris*, 537 Pa. 417, 422 n.3, 644 A.2d 721 (1994); *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969). Further, the opinion repeatedly relies on *Terry v. Ohio* and the Fourth Amendment.

This Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania based on its construction of the federal Fourth Amendment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania seeks certiorari to review an emerging view of the *Terry* standard, in which the Supreme Court of Pennsylvania leads a small minority of states.

This view of *Terry* holds that, since it is not illegal *per se* to have a gun, a report that a suspect has a gun is not material to the question of whether a *Terry* stop is permitted. Many other jurisdictions, however, hold that a report of a gun transforms an otherwise insufficient fact pattern into grounds for a stop and frisk. The Court of Appeals for the Third Circuit has not yet taken a position on this question, but seems to imply that it may follow the lead of the Pennsylvania Supreme Court. This Court has not yet addressed this emerging view of *Terry*.

On October 24, 1994, Philadelphia Police Officer Kyle Bey was contacted by retired police lieutenant Grixbie Stephens, who had worked with him in the past. Stephens said that he was involved in an organization that assists senior citizens, one of whom had told him that drugs were being sold in front of her house at 2128 North Natrona Street. The senior citizen described the drug trafficker as a heavyset middle-aged man known as "Mookie." She specifically warned that "Mookie" carried a gun (N.T. 3/13/95, 8-9).

Bey recognized the name "Mookie" as being the nickname of respondent, William Allen, who also matched the senior citizen's description. Officer Bey also associated "Mookie" with the 2100 block of North

Natrona Street, which was a high drug traffic area (N.T. 3/13/95, 8-10).[1]

Stephens, Officer Bey, and Bey's partner, proceeded to the senior citizen's address. There they saw respondent sitting in a chair in front of the house. His arms were folded across his chest and his eyes were closed. The police could not see whether or not he had anything in his hands. However, they could see that there was a large bulge in his left pants pocket. Concerned that the bulge could be a gun, the officer told respondent to get up and place his hands on the wall. Respondent complied, and a plastic bag containing smaller packets of cocaine became visible inside his sweatshirt (N.T. 3/13/95, 10-16, 18, 21, 23-24; Findings of Fact, 3-5).

The Pennsylvania Supreme Court held that the officers violated the Fourth Amendment. In analyzing the above facts under *Terry*, the Court saw the information possessed by the police as "skeletal," in that it did not include "any details concerning the dates, times, and frequency of the alleged drug sales." The officers "failed to personally observe any suspicious conduct on appellant's part" to corroborate the "incriminating aspects" of what they had been told. The police did not know "with what regularity and frequency [respondent] was selling drugs" at the specified address, and were "unaware of

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[1] Bey and his partner had personally come into contact with drug sales on this block, but had not made many arrests there because the drug dealers would typically operate from inside the houses, which he could not enter without a warrant. However, he regularly passed information regarding this area to the narcotics division (N.T. 3/13/95, 10).

the specific basis of knowledge of the senior citizen." The Court concluded that the officer "should have obtained more information concerning the senior citizen's basis of knowledge, and appellant's alleged drug dealing, before conducting an investigative stop." Alternately, he could have "attempted to personally observe suspicious conduct on the part of appellant." 737 A.2d at 741-742.

Significant in its absence from the above analysis was the report, corroborated by the bulge in the suspect's pocket, that the suspect might have a gun.

The Pennsylvania Supreme Court did not consider the report of a gun significant, and so it simply was not a factor in its analysis of whether there were grounds for a stop. That is because Pennsylvania is one of a number of jurisdictions that regard treating a report of a gun as relevant to the *Terry* analysis as an "exception" to the requirements of *Terry*; an "exception" those jurisdictions refuse to adopt. Other jurisdictions, however, view the report of a gun as a natural component of the reasonable suspicion analysis. The Court of Appeals for the Third Circuit is undecided on this issue, which has the potential to affect thousands of similar cases in a number of states – yet its analysis of related issues seems to parallel that of Pennsylvania. This Court has yet to address the question, and should do so now.

REASONS FOR GRANTING THE WRIT

A REPORT OF A MAN WITH A GUN SHOULD PERMIT A *TERRY* STOP; THIS COURT SHOULD ADDRESS THE EMERGING THEORY THAT A REPORT OF A GUN IS IRRELEVANT.

It hardly needs to be said that police can approach a person for investigation if they are aware of articulable facts that would support reasonable suspicion of criminal activity. They may briefly stop the person in order to investigate further; and may frisk for weapons if they reasonably suspect that the person may be armed and dangerous. *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968).

Reasonable suspicion is supposed to be a "common-sense, non-technical" concept. *Ornelas v. United States*, 116 S. Ct. 1657, 1661 (1996); *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).

Common sense would seem to advise that, in today's world, a report of a gun would add significantly to the reasonable suspicion analysis. In many jurisdictions courts have so held.

But in several states where the question has been addressed, courts have concluded that a report of a gun is completely irrelevant to the decision to make a *Terry* stop.

Pennsylvania is in the forefront of this minority view. In the landmark case of *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), a then-plurality of the Pennsylvania Supreme Court abjured the notion that the presence of a gun supports suspicion of criminal activity. The

Court ridiculed fears of "maniacs who may spray schoolyards with gunfire," and dismissed the contrary view as "radical" "fanciful" "shocking" and "histrionic." It complained that a report of a man with a gun might be nothing more than a "prank," since "anyone can describe a person who is standing in a particular location" and claim that they have a gun. It further noted that concealed guns are not illegal in Pennsylvania – that is, if the gunman is licensed. The Court concluded that there is "no gun exception" to *Terry*. 692 A.2d at 1070-1071.[2]

These sentiments commanded a majority in *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997). In that case, which was "factually indistinguishable from *Hawkins*," the Court rejected the notion that "police have reasonable suspicion to conduct a stop and frisk pursuant to *Terry v. Ohio* . . . based solely on an anonymous tip that a person matching the suspect's description is carrying a gun." The Court explained that the dangers of firearms was "already factored into the balance" of *Terry*, and so adds nothing to the reasonable suspicion analysis. To

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[2] The dissent responded to the plurality's ridicule of the notion that "maniacs" might attack a school by pointing out that, in March 1997, a group of heavily armed men shot 11 police officers and 6 innocent bystanders while robbing a bank. In February 1997 a gunman opened fire at the Empire State Building, wounding 7 people. 692 A.2d at 1071.

All of this of course occurred long before the April 1999 tragedy in Littleton, Colorado, in which two armed students went on a lethal rampage at a high school. As this petition was being written, an armed student shot and wounded several people in a Georgia high school.

hold otherwise would be "in reality to overrule *Terry*[.]" 698 A.2d at 575.

Florida has followed Pennsylvania's lead. In *J.L. v. State*, 727 So. 2d 204 (Fla. 1998), LEXIS 2422, the Supreme Court of Florida, in a *per curiam* ruling, "join[ed] the Supreme Court of Pennsylvania in rejecting" the supposed "firearm exception" to *Terry*. LEXIS 2422 at *12.[3]

In reaching its interpretation of *Terry*, the Florida Supreme Court quoted with approval the Pennsylvania Supreme Court's scorn for the notion that the likely presence of a gun should be weighed in the reasonable suspicion analysis:

> [I]t is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. Even if the Constitution of Pennsylvania would permit such invasive activity as the Commonwealth proposes – which it does not – such activity seems more likely to endanger than to protect the public.

LEXIS 2422 at 12, quoting *Hawkins*, 692 A.2d at 1071.

Pennsylvania and Florida are not alone in their view that *Terry* does not countenance the "shocking" notion that a report of a gun may support reasonable suspicion. The Supreme Court of Massachusetts, in *Commonwealth v. Alvarado*, 423 Mass. 266, 667 N.E.2d 856 (1996), ruled that

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[3] The Florida Supreme Court also noted its "concern[ ]" that a stop and frisk for weapons "might subject a person to prosecution for possession of illegal drugs." *Id.*, *12 n.4.

there was no reasonable suspicion under *Terry* where a suspect was reported to be carrying a gun concealed in a towel. Even though there was no reason to assume that the suspect was licensed, the Court noted that carrying a licensed gun is not a crime in Massachusetts. Thus, the Court concluded that "under the Fourth Amendment, the mere possession of a handgun [is] not sufficient to give rise to a reasonable suspicion that the defendant [is] illegally carrying that gun." 667 N.E.2d at 859 (internal quotation marks and citation omitted).

The view that a report of a gun is legally insignificant, or that giving weight to such a report would create an "exception" to *Terry*, is not restricted to state courts. In *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996), the Court of Appeals concluded that a "fleshless anonymous tip of drug-dealing that provid[ed] only readily observable information" was insufficient for reasonable suspicion where the police themselves saw no suspicious behavior:

> To hold otherwise would work too great an intrusion on the Fourth Amendment liberties, for any citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was selling drugs. Indeed, anyone of us could face significant intrusion on the say-so of an anonymous prankster, rival, or misinformed individual.

90 F.3d at 80-81.

Ostensibly, the Third Circuit Court of Appeals was not deciding the question of "whether such a tip is sufficient to create reasonable suspicion" if it involved "carrying a gun rather than dealing drugs." 90 F.3d at 81 n.4. This "prankster" analysis, however, bears a remarkable resemblance to the "prank call" analysis of the Pennsylvania Supreme Court's decision in *Hawkins*. It is illuminating to substitute the words "carrying a gun" for the words "selling drugs" in the above-quoted passage:

> "[A]ny citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was [carrying a gun]. Indeed, anyone of us could face significant intrusion on the say-so of an anonymous prankster."

It is difficult to see how the Third Circuit Court of Appeals could possibly justify a different result in a gun case in light of its own reasoning, since the Court obviously balks at the idea of allowing a stop on the basis of what might be only "the say-so" of a "prankster."

In *United States v. Fernandez*, 943 F. Supp. 295 (S.D.N.Y. 1996), police received a radio call that a man attending a gang meeting, wearing a white jacket with black stripes, was carrying a gun. The police stopped and frisked a man wearing a black jacket with a white stripe, finding drugs and a loaded .38 caliber revolver. Despite the recent and directly contrary ruling of the Second Circuit in *United States v. Bold*, 19 F.3d 99 (2d Cir. 1994), the district court granted the motion to suppress, ruling that the report of a gun added no weight to the reasonable suspicion analysis.

In *Bold*, the Court of Appeals had reversed a very similar decision from the Eastern District of New York, in which police responded to a call reporting three men lurking in a parked car, one of which had a gun. The District Court Judge held that *Terry* did not permit a stop in these circumstances, protesting that the citizen making the compliant "did not even allege that the possession of the gun was illegal." *United States v. Bold*, 825 F. Supp 25, 28 (E.D.N.Y. 1993). (The Court of Appeals responded that, while it is certainly possible to obtain a gun license in New York, the overwhelming majority of people there are not licensed to carry handguns; 19 F.3d at 104).

The District Court opinion in *Bold* explaining why a report of a gun was *not* relevant under *Terry* was unintentionally ironic:

> There are more than 200 million handguns and other lethal firearms in circulation in the United States. More than 4.2 million firearms are added to that total each year. . . . The stream of interstate commerce overflows with everything from Saturday Night Specials to assault rifles. . . . These weapons caused some 37,000 gunshot deaths in the United States in 1990 and approximately 259,000 non-fatal injuries. Of the 37,000 killed, 4,200 were teenagers. Indeed, firearms were responsible for more deaths than all natural causes among teenagers and young adults. . . .
>
> These statistics paint a frightening picture. The problem they depict, however, derives from the ease with which anyone can acquire a gun and not because of the Fourth Amendment.

825 F. Supp. at 32, citations & internal quotation marks omitted.

Thus, at least one form of common sense, it seems, requires adopting the view that the current plenitude of guns and the abundant havoc they wreak only makes them less, not more, relevant to the reasonable suspicion analysis under *Terry*. That certainly is the view in Pennsylvania, Florida, and Massachusetts, two Federal District Courts in New York, and perhaps in the Court of Appeals for the Third Circuit as well.

Cases like *Hawkins*, *Jackson*, *J.L.*, *Alvarado*, *Bold*, and *Fernandez* are the minority view. Most federal courts have followed reasoning similar to that in *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992) (anonymous tip that suspect in green jacket and black hat was carrying a gun), *cert. denied*, 506 U.S. 1070 (1993). There the Court recognized that a police officer investigating a "man with a gun" call is on the horns of a dilemma. "He must either stop and search the individual or at best follow him through the streets . . . hoping he [will] commit a crime, or at least brandish the weapon, out of doors, where the police can intervene." For the Court in *Clipper*,

> This element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in "controlled buys." Where guns are involved, however, there is the risk that an attempt to "wait out" the suspect might have fatal consequences.

973 F.2d at 951.

The Court considered the argument that "anyone with a grudge" could "fabricate a tip whose neutral details" would be easily corroborated. But such pranksters run the risk of prosecution, and there was no affirmative

evidence of any such fabrications actually having occurred. *Id.* Where a gun may be present, the reasonable choice is for the police to stop and frisk the suspect.[4]

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[4] It must also be recalled that reasonable suspicion focuses on the facts as they appear to the officer at the time of the stop, not as they would appear after investigation in depth. The possibility that seemingly reliable information might be false has no more bearing on the analysis than the possibility that suspicious conduct might have an innocent explanation:

> Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop . . . The test is founded on suspicion, not probable cause. Even if it was equally probable that the vehicle and its occupants were innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.

United States v. Holland, 510 F.2d 453, 455 (9th Cir.), *cert. denied*, 422 U.S. 1010 (1975).

As more recently explained by the Court in *United States v. McBride*, 801 F.2d 1045, 1047 (8th Cir. 1986), *cert. denied*, 479 U.S. 1100 (1987) (citations omitted):

> [I]t is immaterial that the details corroborating an informant's tip are as consistent with innocent conduct as with illegal activity. Courts have recognized that persons through malice might fabricate tips and meet this test for corroboration by adding neutral information such as a location or vehicle description . . . but those courts have also recognized that the choice for police is between making limited investigatory stops and ignoring citizen tips. Some criminal conduct in inherently impossible to verify by visual observation alone.

The proper analysis, therefore, is that *even if* the report might be a fabrication, the officer acts properly if he or she acts upon facts that appear reliable and would warrant an investigatory stop.

Other federal courts have reached similar conclusions. *E.g., United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996) (where there is a report of a man with a gun, a *Terry* stop "strike[s] the proper balance between the right of the people to be left alone and their right to be protected"); *United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995) (*Terry* stop proper where anonymous tip reported possibly armed men and suspects matched description given, despite absence of prediction of future conduct), *cert. denied*, 517 U.S. 1173 (1996).

State courts that have considered the issue also have held that a report of a gun weighs heavily in the *Terry* analysis. The Supreme Judicial Court of Maine concluded that the choices the police must face when responding to a "man with a gun" call must be resolved "in favor of the limited intrusion on privacy represented by a stop and pat-down for concealed weapons." *State v. Hasenbank*, 425 A.2d 1330, 1334 (Me. 1981). The New Jersey Supreme Court explained,

> Where a weapon or explosive is involved it would be folly to say that the police should be compelled to ignore information, though from an anonymous source, and do nothing to protect the public under penalty of the suppression of evidence if they do what their duty reasonably demands.

State In The Interest Of H.B., 75 N.J. 243, 381 A.2d 759, 763-764 (1977). The Supreme Court of Hawaii held that the police are "duty-bound" to make an investigatory stop of a person anonymously identified as carrying a gun. *State v. Kuahuia*, 62 Haw. 464, 616 P.2d 1374, 1375 (1980). In *People v. Smithers*, 83 Ill. 2d 430, 415 N.E.2d 332

(1980), the Supreme Court of Illinois ruled that the reported presence of a gun "casts a heavy weight in favor of the reasonableness" of police action under *Terry*. "We should evaluate the officers' actions in light of one's reaction had they failed to act."[5]

Terry itself emphasized the need to balance the safety of police officers and the public in determining the propriety of a stop and frisk:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties . . . [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.

392 U.S. at 23-24.[6]

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[5] *Accord State v. Franklin*, 41 Wash. App. 409, 704 P.2d 666, 669 (1985) (collecting cases); *People v. D.F.*, 933 P.2d 9 (Colo. 1997); *In Re. J.L.G.*, 209 Ga. 565, 434 S.E.2d 126 (1993); *Allen v. State*, 85 Md. App. 657, 584 A.2d 1279 (1991); *People v. Salaman*, 71 N.Y.2d 869, 527 N.Y.S.2d 750, 522 N.E.2d 1048 (1988); *State v. Pulley*, 863 S.W.2d 29 (Tenn. 1993); *Scott v. Virginia*, 20 Va. App. 725, 460 S.E.2d 610 (1995).

[6] Also worthy of note is the analysis of the Maryland Court of Special Appeals in addressing a challenge to a *Terry* stop and frisk:

> In balancing the interests that are involved when a close call must be made by an officer on the street, we cannot forget that an error on one side of the line may result in an inconvenienced and offended citizen, a circumstance not to be lightly dismissed. An error on

As summarized by Professor LaFave,

> [I]n some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information cannot be permitted to stand in the way of prompt police action. . . . Certainly a stopping for investigation will be the least intrusive effective means of dealing with certain special situations, such as a major bomb scare or the kidnapping of a child, and thus there is good reason to acknowledge that lesser evidence than is otherwise required may be used in such situations . . . courts have most frequently relied upon [this] rationale to permit investigative stops to be made on the basis of an anonymous call that a certain person at a certain place was armed with a gun.

LaFave, *Search and Seizure* (West, 1987), § 9.4(h) at 229.

Pennsylvania and those jurisdictions that follow its reasoning purport to follow *Terry*; but in fact, they seriously distort the rationale of that case. These jurisdictions clearly recognize that a report of a man with a gun warrants investigation, but they decline to allow police to act in a way that would reasonably allow investigation to occur. The police are told that they may investigate, but only in a way that risks their lives and the lives of those

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> the other side of the line, however, may result in a dead policeman.

State v. Blackman, 94 Md. App. 284, 617 A.2d 619, 628 (1992).

around them. Their other supposed choice – to passively watch the suspect and hope that he does something overtly incriminating – is simply an abdication of investigation, and does not reduce the risk. The only rational choice under these cases, it seems, is for the police to stay safely indoors. Abandoning the public to its fate is viewed by such courts as the proper application of *Terry*.

Under *Terry* as understood by the Pennsylvania Supreme Court, a report of a man entering a school with a gun is not a cause for "histrionic" concern. The police should assume the gunman is planning to teach firearms safety. Investigating would be "more likely to endanger than to protect the public." *J.L.*, LEXIS 2422 at 12; *Hawkins*, 692 A.2d at 1071.

Jurisdictions that follow the Pennsylvania view of *Terry* are systematically misapplying the Fourth Amendment, in a way that places literally thousands of people unnecessarily at risk from gun violence. In the midst of a national crisis in which ways are sought to control illegal handguns, the one thing that is not needed is an idiosyncratic interpretation of *Terry* that bars reasonable police investigation of "man with a gun" calls. This Court should grant *certiorari* in this case in order to address this emerging and disturbing understanding of *Terry v. Ohio*.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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COMMONWEALTH OF PENNSYLVANIA, Appellee,

v.

WILLIAM ALLEN, Appellant.

4 E.D. Appeal Dkt. 1998

SUPREME COURT OF PENNSYLVANIA

725 A.2d 737; 1999 Pa. LEXIS 488

June 10, 1998, Submitted

February 26, 1999, Decided

PRIOR HISTORY: Appeal from the Order of the Superior Court dated *July 17, 1996 at No. 02106 Phila. 1995* reversing the Order of the Philadelphia County Court of Common Pleas dated May 12, 1996 at No. 9411-0024. 681 A.2d 778, 452 Pa. Super. 200. JUDGE(S) BELOW: CCP – Hon. Levan Gordon/SUPERIOR-Cirillo, PJE., Del Sole, J. and CERCONE, PJE.

DISPOSITION: Reversed.

COUNSEL: FOR APPELLANT, W. Allen: John W. Packel, Esquire, Karl L. Morgan, Esquire.

FOR APPELLEES, Commonwealth: Catherine Marshall, Esquire.

JUDGES: BEFORE: FLAHERTY, C.J., AND ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN AND SAYLOR, JJ. MR. JUSTICE NIGRO Mr. Justice. Castille files a dissenting opinion in which Madame Justice Newman and Mr. Justice Saylor join.

OPINION BY: NIGRO

OPINION:

OPINION OF THE COURT

MR. JUSTICE NIGRO

DECIDED: February 26, 1999

This is an appeal from the order of the Superior Court reversing the trial court's suppression of the drugs found on appellant's person during the course of an investigatory stop made pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The issue presented for our review concerns whether the police officer who discovered the drugs on appellant's person during the course of the investigatory stop had a reasonable suspicion that appellant was currently engaged in criminal activity at the time that he conducted the investigatory stop. Because we conclude that the police officer did not have a reasonable suspicion that appellant was currently engaged in criminal activity at the time of the stop, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

Initially, we note that we are bound by the factual findings of the suppression court which are supported by the record, and are limited to determining whether the legal conclusions that the suppression court drew therefrom are correct. *Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444, 451 (Pa. 1998) (citing *Commonwealth v. Cortez*, 507 Pa. 529, 491 A.2d 111, (1985), cert. denied, 474 U.S. 950, 106 S. Ct. 349, 88 L. Ed. 2d 297 (1985)). With this standard of review in mind, a recitation of the circumstances underlying the instant appeal are in order.

On October 24, 1994, Philadelphia Police Officer Kyle Bey received information from a retired police lieutenant

named Grixbie Stephens that a man nicknamed "Mookie" had been selling drugs out of a house located at 2128 North Natrona Street in North Philadelphia.[1] Upon receiving the information, Officer Bey proceeded to 2128 North Natrona Street with his partner and Stephens, ostensibly to investigate appellant's activities. Upon arriving there, Officer Bey observed appellant sitting, apparently asleep, in a chair in front of the house. Appellant met the general description of "Mookie" given by Stephens. When Officer Bey exited his patrol car to approach appellant, he noticed a large bulge in appellant's front left pocket. Concerned that appellant might be armed, Officer Bey ordered appellant to get up and put his hands against the wall. Appellant complied, and when he did, his sweatshirt pocket flared open, revealing several packets of crack cocaine. Officer Bey handcuffed appellant, searched him, and found several more packets containing crack cocaine in his front left pocket. Appellant was arrested and charged with several drug possession offenses. He moved to suppress the drugs found on his person as the fruit of an illegal stop and/or arrest, prompting the trial court to hold a suppression hearing on March 13, 1995.

At the suppression hearing, Officer Bey was questioned concerning the content of the information provided to him by Stephens prior to appellant's arrest.

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[1] Although the lower courts cite Grixbie Stevens as the source of Officer Bey's information, and 2128 North Latona [sic] Street as the location of the alleged drug dealing, the record reflects that the correct spelling of the lieutenant's name is Grixbie Stephens and that the correct spelling of the location of the alleged drug dealing is 2128 North Natrona Street.

Officer Bey's testimony regarding the substance of the information given to him by Stephens was as follows:

> I had spoken to him [Stephens] at the district, the 22nd, at 17th and Montgomery. And he had related to me that he was working with a senior citizens organization, some adult services that he renders. And he had information on the 2100 block of Natrona Street, the exact address of this information being 2128 North Natrona Street. That a woman who had lived there, a senior citizen who he was to be doing work for, handling a service for, was having drugs sold out of her house, not by her, but by others, and that the drugs were also being sold at the street level in front of her property. At that time he also gave me a description of a male and the nickname of a male. This description was of a middle-aged man, heavyset, who went by the name of Mookie. . . . He gave information to me of this person being known to carry a gun and sell narcotics either from inside of this location or outside.

(N.T., 3/13/95, at 8-9.)

Officer Bey also testified at the suppression hearing that he knew the 2100 block of North Natrona Street to be a high drug traffic area, but he had never personally made any narcotics arrests there. He further stated that upon receiving the information from Stephens, the name "Mookie" clicked in his head, and he believed that he had come into contact with "Mookie" before while on duty. However, he could not remember when, or in what context, that contact took place.

Following the suppression hearing, the trial court concluded that Officer Bey did not have a reasonable suspicion that appellant was currently engaged in criminal activity at the time of the investigatory stop, and therefore suppressed the physical evidence seized from appellant's person. The trial court's decision to suppress the physical evidence was largely based on its finding that the information provided to Officer Bey by Stephens was skeletal at best, and failed to provide any details concerning the dates, times, and frequency of the alleged drug sales. In addition, the trial court noted that Officer Bey failed to personally observe any suspicious conduct on appellant's part that would corroborate the incriminating aspects of the information provided by Stephens.

The Commonwealth took an interlocutory appeal to the Superior Court following the trial court's suppression of the drugs found on appellant.[2] The Superior Court, with Judge Del Sole dissenting, reversed the trial court's suppression of the drugs. The Superior Court specifically found that the information provided by Stephens did, in fact, create a reasonable suspicion on Officer Bey's part that appellant was engaged in criminal activity at the time of his initial Terry stop, that Officer Bey was justified in proceeding to conduct a pat down search for weapons, and that the initial discovery of cocaine inside appellant's sweatshirt provided probable cause to arrest him. This

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[2] The Commonwealth's interlocutory appeal to the Superior Court was taken pursuant to Pennsylvania Rule of Appellate Procedure 311(d), which permits Commonwealth appeals as of right from lower court decisions that the Commonwealth certifies will either terminate or substantially handicap the prosecution.

Court granted appellant's petition for allowance of appeal.[3]

The police are permitted to stop and briefly detain citizens whenever they have a reasonable suspicion, based on specific and articulable facts, that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 30, 88 S. Ct. 1868, 1880, 1884, 20 L. Ed. 2d 889 (1968); *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226, 228 (1996); *Commonwealth v. Hicks*, 434 Pa. 153, 160, 253 A.2d 276, 280 (1969). In evaluating whether a stop is justified, courts consider whether or not an informant's tip creates a reasonable suspicion of current criminal activity based on the totality of the circumstances. *Alabama v. White*, 496 U.S. 325, 328-29, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301 (1990); *Commonwealth v. Martin*, 705 A.2d 887, 892 (Pa. Super. 1997); *Commonwealth v. Wilson*, 440 Pa. Super. 269, 275-76, 655 A.2d 557, 560-61 (1995) (citing *Commonwealth v. Epps*, 415 Pa. Super. 231, 233-34, 608 A.2d 1095, 1096 (1992)). The informant's reliability, veracity, and basis of knowledge are all relevant factors. *Alabama v. White*, 496 U.S. 325, 328, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301 (1990) (citing *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983)). Of course, the information supplied to the police by the informant must contain "specific and articulable facts" that lead the police to reasonably suspect that criminal activity may be afoot.

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[3] In addition to arguing that Officer Bey lacked reasonable suspicion justifying an investigatory stop, appellant argues that he was arrested without probable cause. Appellant, however, only argued the lack of reasonable suspicion in his petition for allowance of appeal. Thus, that is the only issue before this Court.

See Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 228 (1996) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)). In addition, if the police reasonably believe that a suspect may be armed and dangerous, then they are permitted to conduct a limited pat-down search of the suspect's outer clothing for weapons to ensure their safety. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 92-93, 100 S. Ct. 338, 342-43, 62 L. Ed. 2d 238 (1979).

Having reviewed the testimony provided at the suppression hearing, the trial court's Findings of Fact and Conclusions of Law, and the Superior Court's opinion reversing the suppression of the drugs found on appellant, we conclude that at the time of the initial Terry stop, Officer Bey did not possess sufficient information to raise a reasonable suspicion that appellant was currently engaged in criminal activity. Officer Bey offered no indication in his testimony at the suppression hearing that Stephens had given him any information concerning when appellant was alleged to have sold drugs at 2128 North Natrona Street, or with what regularity and frequency he was selling drugs there. In addition, Officer Bey's testimony fails to establish whether or not Stephens told him the specific basis of the knowledge concerning the drug activity. The trial court found that Stephens told Bey that he received his information concerning the drug dealing at 2128 North Natrona Street from a senior citizen for whom he provided services. Bey's testimony provides no indication that Stephens told him how the senior citizen who gave him his information knew that "Mookie" had been selling drugs and carrying a gun at

2128 North Natrona Street. Therefore, the trial court correctly concluded that Officer Bey was unaware of the specific basis of knowledge of the senior citizen who gave the information concerning "Mookie" to Stephens.[4] The skeletal information provided to Officer Bey by Stephens, combined with the mere fact that appellant was sitting, apparently asleep, outside of 2128 North Natrona Street upon Bey's arrival, simply fails to support the Superior Court's conclusion that Officer Bey had a reasonable suspicion that appellant was currently engaged in criminal activity at that time.[5]

Importantly, appellant's presence outside 2128 North Natrona Street upon Officer Bey's arrival there corroborated only an innocent detail of the information provided by Stephens. Officer Bey could have corroborated Stephens' information by observing suspicious conduct on the part of appellant, and thereby developed the requisite

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[4] Contrary to the trial court, the Superior Court stated that a senior citizen living at 2128 North Natrona Street was the source of Stephens' information concerning the alleged drug activity at that address. However, Bey's testimony does not clearly specify who told Stephens about the drug activity. The trial court's finding that the source of Stephen's information was a senior citizen for whom he provided services is supported by the record and we are thus bound by it. In any event, even if the senior citizen lived at 2128 North Natrona Street, Officer Bey was never made aware of the specific basis of his or her knowledge.

[5] We do not question Stephens' veracity or reliability, and we are sure that he relayed the information that he received to Officer Bey with only the most laudable intentions. However, we are not of the opinion that the information that Stephens provided to Officer Bey, in and of itself, is sufficient to justify Officer Bey's investigatory stop of appellant.

reasonable suspicion that appellant was dealing drugs to justify a Terry stop. *See Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068, 1071 (Pa. 1997) (plurality opinion) ("Upon receiving unverified information that a certain person is engaged in illegal activity, the police may always observe the suspect and conduct their own investigation. If police surveillance produces a reasonable suspicion of criminal conduct, then the suspect may, of course, be briefly stopped and questioned [pursuant to Terry v. Ohio]. . . . ").

In sum, Officer Bey received second-hand information that lacked any indication with what frequency appellant was selling drugs, or that appellant was currently engaged in doing so. He then proceeded to observe appellant sitting in a chair, apparently asleep, outside the property where Stephens relayed that he had been dealing drugs. Officer Bey should have obtained more information concerning the senior citizen's basis of knowledge, and appellant's alleged drug dealing, before conducting an investigative stop. In the alternative, as was mentioned above, Officer Bey could have attempted to personally observe suspicious conduct on the part of appellant, which would have corroborated the incriminating aspects of Stephens' information. Unfortunately, Officer Bey instead decided to rely on the non-specific and second-hand information provided to him by Stephens as his justification for stopping appellant. As a result, Officer Bey's decision to stop appellant and pat him down for weapons was not prompted by a

reasonable suspicion that appellant was currently engaged in criminal activity.[6]

The Fourth Amendment to the United States Constitution, and Article 1, Section 8 of the Pennsylvania State Constitution require that police officers have within their knowledge "specific and articulable facts" raising a reasonable suspicion that criminal activity is afoot before they conduct an investigatory stop of an individual. *See, e.g., Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226, 228-29 (1996) (discussing federal and state constitutional constraints on police investigatory stops recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969)). We find that, considering the totality of the circumstances, Officer Bey did not have within his knowledge "specific and articulable facts" raising a reasonable suspicion that appellant was currently engaged or about

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[6] In reaching the opposite conclusion, the Superior Court relied on In the *Interest of S.D.*, 429 Pa. Super. 576, 633 A.2d 172 (1993), where the court found that reasonable suspicion justified an initial investigative stop. In that case, an individual walking the streets in a high crime area during the early hours of the morning saw two men carrying drugs and guns. He immediately informed an officer patrolling nearby of his observations, and the officer proceeded to conduct a Terry stop of the suspects. In the instant case, Stephens was not an eyewitness to any criminal activity. His basis of knowledge was a third person, whose basis of knowledge was unknown to Officer Bey. In addition, Stephens did not provide any information to Officer Bey suggesting that appellant was currently engaged in criminal activity. Thus, In the Interest of S.D. is inapposite.

to engage in criminal activity at the time of his investigatory stop. Because the physical evidence seized from appellant's person was obtained by contravening his rights under the Fourth Amendment to the Federal Constitution and Article 1, Section 8 of the Pennsylvania State Constitution, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

Mr. Justice Castille files a dissenting opinion in which Madame Justice Newman and Mr. Justice Saylor join.

DISSENT BY: CASTILLE

DISSENT:

DISSENTING OPINION

MR. JUSTICE CASTILLE

I respectfully dissent, as I believe that Officer Bey reasonably suspected that criminal activity was afoot at the time he initiated an investigative stop of appellant. Consequently, I would affirm the Superior Court's determination that the investigative stop comported with the requirements of both the United States and Pennsylvania Constitutions.

In its analysis of what Officer Bey observed upon arrival outside 2128 North Natrona Street, the majority correctly points out that Officer Bey observed "Mookie," the subject of the tip and a person with whom he was familiar, sitting in a chair on the sidewalk with his arms folded across his chest and his eyes closed in front of the same house which was identified in the tip and which was located in an area that the officer knew to be a high drug-trafficking area. However, the majority's recitation

of the facts omits one rather crucial fact. Namely, Officer Bey, who had been told by the tipster that "Mookie" would be carrying a gun, observed a "big bulge" in appellant's left front pants pocket. N.T. 3/13/95, at 12-13, 23-24. It was the observation of this bulge which, in combination with the officer's corroboration of all other parts of the tip except for the actual witnessing of a narcotics sale, gave Officer Bey a reasonable suspicion that criminal activity was afoot.[1] Indeed, to hold otherwise is to contravene the persuasive precedent of our sister states as well as the federal courts which have unanimously concluded that observation of a hidden bulge pursuant to a tip predicting the presence of an identifiable armed suspect at a certain location gives rise

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[1] In analyzing the nature of the tip itself, the majority suggests that the tip should be deemed less reliable because the former policeman who passed the tip along to Officer Bey did not reveal the name of the senior citizen who provided the information to him. However, the important point is that the senior citizen did not come forward anonymously, but instead sought out a former police officer in person to convey the information, telling him that she knew her information to be reliable because she lived in the house out of which "Mookie" was selling drugs. This willingness of the tipster to be identified, as opposed to providing information through an anonymous phone call, placed the tip in a more reliable category under this Court's jurisprudence, notwithstanding the majority's conclusion to the contrary. *See Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571, 574 (1997) (anonymous tip is less reliable because "a known informant places himself or herself at the risk of prosecution for filing a false claim if the tip is untrue, whereas an unknown informant does not").

to a reasonable suspicion of criminal activity afoot and, hence, a justifiable Terry stop.[2]

At the outset, it is important to set forth the axiom that Fourth Amendment Terry stop analysis balances the "need to search or seize against the invasion which the search or seizure entails." *Michigan v. Long*, 463 U.S. 1032, 1046, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). When weighing the need to search or seize, we must of course be mindful that a tip which implicates a risk to public safety by alerting police that the individual described has access to a gun suggests a greater need to search or seize than a tip which does not alert the police to this fact. *Speight v. United States*, 671 A.2d 442, 448 (D.C. 1996). Thus, courts have consistently upheld the right of police to conduct a limited interrogation and/or search in situations where tipsters described an armed individual and where the officers subsequently corroborated the description of the individual and observed a bulge in the individual's clothing. *See Ramirez v. State*, 672 S.W.2d 480 (Texas Crim. App. 1984) (cited favorably in *Gutierrez v. State*, 1996 Tex. App. LEXIS 511, at * 10) (pursuant to "man with a gun tip" from unnamed witness, police officer observed a man matching the description of the subject of the tip with a bulge in his pocket;

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[2] Assuming arguendo that the initial Terry stop was justified, the subsequent arrest was, of course, supported by probable cause. This is manifest since, during the Terry stop, the suspect's large sweatshirt pocket flared open, exposing numerous clear plastic packets of cocaine.

court held that reasonable suspicion existed for a temporary detention and limited search for weapons); *New York v. Quan*, 182 A.D.2d 506, 507, 582 N.Y.S.2d 190 (1992) (even without any tip, officer's observation of bulge in shape of gun handle, in itself, constituted reasonable suspicion); *Gaskins v. United States*, 262 A.2d 810, 812 n.2 (D.C. 1970) (pursuant to tip from "seemingly reasonable" tipster, if officer "saw a gun bulge, he would be warranted in seizing it"); *United States v. Colon*, 1998 U.S. Dist. LEXIS 3259, at *9 (bulge in coat cited as central observation validating investigative detention). Additionally, the United States Supreme Court has determined that, in the course of an ordinary traffic stop, an officer's observation of a bulge in the driver's jacket is, in itself, sufficient grounds to conduct a limited search. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed. . . . ")

Thus, at the moment that Officer Bey ordered appellant to get up and put his hands against the wall, he was justified in doing so by having corroborated appellant's presence in a high drug trafficking area, outside the home in which the tipster lived and from which the tipster claimed that appellant trafficked in drugs, with a big bulge in his pants pocket which appeared to the officer to be consistent with the gun with which the tipster predicted appellant would be armed. Indeed, to allow appellant to go forth without even questioning him in this situation, when appellant appeared to be carrying a concealed firearm, would have amounted to a dereliction of Officer Bey's duties – a dereliction which might have had

serious implications for the safety of innocent citizens of the Commonwealth.

I believe that the Court's error today is partly a result of its failure to appreciate the principles that drive the distinction between the "reasonable suspicion" required for a Terry stop and the "probable cause" required for an arrest. In a Terry stop, the intrusiveness of the police conduct at issue is comparatively negligible. The police are not seeking to strip the subject of his liberty and bring him to trial. An individual may well be annoyed by having to respond to questions or by submitting to a brief detention – especially if that individual is trying to obfuscate some criminal conduct – but police officers do not intrude on any deeply ingrained notion of liberty simply by asking a question or initiating an extremely brief detention to ensure the safety of the citizenry. That is why the standard of "reasonable suspicion" required for an investigative stop is far less exacting than the standard of "probable cause" for an arrest, which is itself far less exacting than the necessary "proof beyond a reasonable doubt" required to convict. These different standards are driven by the vastly different levels of intrusion that are implicated by investigative stops, arrests, and finally by convictions.

Here, after an admirable collaboration between a concerned senior citizen, an ex-police officer, and a current police officer, and after diligent police work corroborating the significant details of the senior citizen's tip, two hundred and fifty-six packets of crack cocaine were seized from a purveyor of illegal narcotics. In suppressing this evidence, the majority fails to demonstrate why a departure from the sound reasoning of the United States

Supreme Court and our sister states is warranted. I respectfully dissent.

Madame Justice Newman and Mr. Justice Saylor join this dissenting opinion.

COMMONWEALTH OF PENNSYLVANIA,
Appellant v. WILLIAM ALLEN

NO. 02106 PHILADELPHIA 1995
SUPERIOR COURT OF PENNSYLVANIA

452 Pa. Super. 200; 681 A.2d 778;
1996 Pa. Super LEXIS 2141

May 2, 1996, Argued

July 17, 1996, Filed

PRIOR HISTORY:

Appeal from the Order Entered May 12, 1996 In the Court of Common Pleas of Philadelphia County Criminal Division No. 9411-0024. Before GORDON, J.

Appeal from the Order Entered May 12, 1995 in the Court of Common Pleas of Philadelphia County Criminal Division at No. 9411-0024. Before GORDON, J.

COUNSEL: Mary L. Porto, Assistant District Attorney, Philadelphia, for Commonwealth, appellant.

Karl Morgan, Philadelphia, for appellee.

JUDGES: Before: CIRILLO, P.J.E., DEL SOLE, J. and CERCONE, P.J.E. Del Sole, J. files a dissenting opinion.

OPINION BY: CERCONE

OPINION:

OPINION BY CERCONE, P.J.E.:

Filed July 17, 1996

This is an appeal by the Commonwealth from an order suppressing physical evidence found on appellee William Allen.[1] We reverse.

After the suppression hearing, the lower court made the following findings of fact:

> On October 24, 1994 at approximately 1:25 PM Philadelphia Police Officer Kyle Bey assigned to the 22nd Police District received information from one Grixby Stevens who works with senior citizens with regard to certain drug activity. . . . Mr. Stevens is a retired Philadelphia Police Department lieutenant and has only formerly worked for the 22nd Police District. . . . Mr. Stevens was known to Officer Bey.
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> That Stevens informed Bey that drugs were being sold by a heavyset middle-aged male known as . . . Mookie . . . out of a house located at 2128 North Latona Street in Philadelphia. . . . Mr. Stevens further stated that Mookie is known to also carry a gun. . . .
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> That Stevens told Bey that a senior citizen lives in the house in which Stevens asserted the drugs were being sold. . . . Stevens. . . . received this information from a senior citizen . . . for whom he provides services.
>
> That Stevens told Bey that the senior citizen is allowing the drugs to be sold out of her house, not by herself, but by Mookie. Stevens further stated that drugs were also being sold on the

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[1] The Commonwealth has certified that the suppression order terminates or substantially handicaps its prosecution of appellee. As such, this appeal is proper. Pa. R.A.P. 311(d), 42 Pa.C.S.A.

street in front of the residence. . . . Bey testified that the 21 hundred block of Latona Street was known as a high drug traffic area.

That Officer Bey based upon Stevens' description stated [that Mookie] was a person he had come in contact with on a prior occasion. . . . Bey indicated that he was familiar with the 21 hundred block of Latona Street because he and his partner had come into contact with drug sales on the street; . . . Bey testified he had never made any arrests on the block.

That based upon the information acquired from Stevens[,] Bey and his partner Officer Craig Noll rode to the 21 hundred block of Latona Street and to the residence of 2128 North Latona along with Mr. Stevens.

That as the officers entered the block they observed a male whom they believed to be the [appellee], sitting on the sidewalk in a chair with his hands folded, leaning back with his head down, and his eyes appearing to be closed, outside of the property at 2128 North Latona Street.

That Officer Bey approached the [appellee] and observed a large bulge in his left pants pocket. . . . Bey told the [appellee] to get up and put his hands on the wall. . . .

That Officer Bey observed a clear plastic baggie which contained off-white chunky substances inside . . . the flared front pocket of the [appellee's] sweatshirt. The [appellee] was handcuffed and searched.

That upon searching the [appellee] Bey retrieved from the [appellee's] pants pocket clear and multicolored packets which contained

> rocklike substance also alleged to be crack-cocaine. . . . The [appellee] was subsequently arrested. . . .

Findings of Fact and Conclusions of Law dated May 12, 1995 at 2-5. Appellee, thereafter, moved to suppress the physical evidence seized. After presiding over a hearing on March 13, 1995, the suppression court concluded as a matter of law that the officer lacked either reasonable suspicion to conduct an investigative stop or probable cause to make an arrest. Consequently, the lower court granted appellee's motion. In this timely appeal, the Commonwealth contends that the lower court erred in granting appellee's suppression motion.

In reviewing an appeal taken by the Commonwealth from an order suppressing evidence,

> [an appellate] court must first ascertain whether the record supports the factual findings of the suppression court, and then determine the reasonableness of the inferences and legal conclusions drawn therefrom. . . . If the evidence supports the [suppression court's] factual findings, we may only reverse if the legal conclusions drawn therefrom are in error.

Commonwealth v. Gommer, 445 Pa.Super. 571, 665 A.2d 1269, 1270 (1995) (citations omitted). The suppression court bears exclusive responsibility for assessing the credibility of witnesses and determining the weight to be accorded to their testimony. *Commonwealth v. Dorsey*, 439 Pa.Super. 494, 498, 654 A.2d 1086, 1088 (1995). Although we are bound by findings of fact which are supported by the record, we are not bound by the legal conclusions drawn from those facts. *Id.*

Fourth Amendment jurisprudence delineates three categories of interaction between citizens and the police. *Commonwealth v. Ellis*, 541 Pa. 285, 293, 662 A.2d 1043, 1047 (1995).

> The first of these is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. *See Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an "investigative detention" must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *See Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. *See Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriquez*, 532 Pa. 62, 614 A.2d 1378 (1992).

Id. at 293-94, 662 A.2d at 1047-48 (footnote omitted). Preliminarily, we must determine whether the detaining officer initially subjected appellee to an investigative detention or a custodial detention.

A custodial detention arises when the conditions and or duration of an investigative detention become so coercive as to be the functional equivalent of an arrest. *Commonwealth v. Douglass*, 372 Pa.Super. 227, 239, 539 A.2d 412, 418 (1988), appeal denied, 520 Pa. 595, 552 A.2d 250 (1988) (plurality opinion). Whether an arrest has occurred

depends upon the impression conveyed to the person detained, not upon the officers' subjective intentions. *Commonwealth v. McManus*, 353 Pa.Super. 355, 359, 509 A.2d 1314, 1316 (1986). In determining whether a detention is investigative or custodial, a reviewing court considers the totality of the circumstances including

> "the basis for the detention (the crime suspected and the grounds for suspicion); the duration of the detention; the location of the detention (public or private); whether the suspect was transported against his will (how far, why); the method of detention; the show, threat, or use of force, and, the investigative methods used to confirm or dispel suspicion."

Gommer, 445 Pa.Super. at 581, 665 A.2d 1269, 1274 (quoting *Commonwealth v. Douglass*, 372 Pa.Super. at 244-45, 539 A.2d at 421) (after observing appellant driving in an erratic and dangerous manner, an off-duty officer stopped the suspect's vehicle, took possession of his keys, and briefly detained him until other officers could arrive; this did not amount to a custodial detention or arrest). *See also Commonwealth v. White*, 358 Pa.Super. 120, 516 A.2d 1211 (1986) (suspects were not subject to a custodial detention when officers detained them in a police car for a period of five minutes to ensure the safety of one officer while the other officer investigated the crime scene; the suspects were not frisked, handcuffed or formally placed under arrest, nor did the officers draw their weapons).

In this case, Officer Bey detained appellee based on reports of drug dealing. The officer directed appellee to stand, walk about five (5) feet to a wall and place his hands against that wall to facilitate a weapons frisk. *See*

White, supra, 358 Pa.Super. at 128, 516 A.2d at 1215 (in assessing whether a detention is too long in duration to be justified as an investigative stop, the courts consider whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly during the time it was necessary to detain the suspect). It does not appear from the record that the officer drew a weapon while approaching appellee. Further, it is unclear whether the officer approached appellee alone or with his partner. As he was about to initiate the frisk, the officer saw the packet of cocaine in appellee's pocket. At that point, the officer handcuffed appellee and placed him under arrest. We cannot agree that the brief period of detention which occurred prior to the officer's observation of cocaine can be equated with an arrest or custodial detention. *See White,* 358 Pa.Super. at 131, 516 A.2d at 1217 (noting that every Terry stop involves both a stop and a period of detention during which the suspect is not free to leave but is subject to the control of the police officer).

Assuming that the officer instead conducted an investigative detention, we must now determine whether that stop was predicated on "reasonable suspicion." " '[When] a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot' the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions." *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, ___, 124 L.Ed.2d 334, 344 (1993) (quoting *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, ___, 20 L.Ed.2d 889, 911 (1968)). "[F]or such a stop to be reasonable . . . , the

officer must point to specific and articulable facts 'which in conjunction with rational inferences deriving therefrom' warrant the initial stop." *Commonwealth v. Arch*, 439 Pa.Super. 606, 612, 654 A.2d 1141, 1143 (1995). We must examine the totality of the circumstances to determine whether a particularized and objective basis for suspecting an individual stopped of criminal activity exists. *Commonwealth v. Wilson*, 440 Pa.Super. 269, 275-76, 655 A.2d 557, 561 (1995), appeal granted, 543 Pa. 509, 673 A.2d 864 (1996). Although the reasonable suspicion necessary to justify a Terry stop is less stringent than probable cause, the detaining officer must have more than a hunch as the basis for his stop. Mere presence near a high crime area or in the vicinity of a recently reported crime does not warrant a Terry stop. *Commonwealth v. Kearney*, 411 Pa.Super. 274, 278, 601 A.2d 346, 348 (1992).

A police officer need not personally observe the illegal or suspicious conduct which leads him or her to believe that criminal activity is afoot and that a person is armed and dangerous. In the *Interest of S.D.*, 429 Pa.Super. 576, 579, 633 A.2d 172, 174 (1993). In such cases, "we must consider 'the specificity of the description of the suspect in conjunction with how well the suspect fits the given description, the proximity of the crime to the sighting of the suspect, the time and place of the confrontation, and the nature of the offense reported to have been committed.' " *Id.* (quoting *Commonwealth v. Jackson*, 359 Pa.Super. 433, 438, 519 A.2d 427, 430 (1986)). In certain circumstances, even a very limited description may justify an investigatory stop. *Interest of S.D.*, 429 Pa.Super. at 580, 633 A.2d at 174.

In *Interest of S.D.*, a pedestrian informed an officer that two armed black men with drugs were located around the corner. Approximately fifty (50) feet away from where he had received that information, the officer saw appellant, S.D., standing with another man. No other individuals were in the vicinity. The officer immediately conducted a patdown search. The court also noted that the officer conducted the stop in an area of high drug incidence and that the encounter occurred at 5:25 in the morning. *Id.* After viewing the enumerated factors in light of the totality of the circumstances, the court ruled that the initial investigatory stop and pat-down frisk of S.D. were justified. *Id.* at 581, 633 A.2d at 174.

The officer in this case was likewise justified in conducting the initial stop. A senior citizen living at 2128 North Latona Street advised a retired police officer that a heavyset, middle-aged man named "Mookie" was selling drugs out of her house and in front of her property. "Mookie" was known to carry a gun. The retired officer so informed Officer Bey. Officer Bey testified that the name "clicked." He was familiar with an individual satisfying that description who went by the name of "Mookie." Officer Bey further described the area as a high drug area. Based on the foregoing information, Officer Bey drove toward 2128 North Latona Street.

> [In] the typical informant case, . . . there exists the potential that the informant is acting out of self-interest. . . . When the average citizen tenders information to the police, [however], the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.

Commonwealth v. Dennis, 417 Pa.Super. 425, 431, 612 A.2d 1014, 1016 (1992), appeal denied, 535 Pa. 654, 634 A.2d 218 (1993).

When detained, about one-half hour after the officer received the report, Mookie was sitting in a chair on the sidewalk in front of the exact house the senior citizen had identified. Officer Bey noticed a bulge in appellee's pocket. After viewing the factors enumerated in light of the totality of the circumstances, we conclude that the officer's subsequent investigatory stop of appellee was supported by the requisite reasonable suspicion.

After the officer conducted a legal stop of appellee, he was then justified in performing a protective patdown frisk. "To justify a frisk incident to an investigatory stop, the officer must point to 'specific and articulable facts indicating the person they intend to frisk may be armed and dangerous; otherwise, the talismanic use of the phrase "for our own protection" becomes meaningless.' " *Interest of S.D.*, 429 Pa.Super. at 581, 633 A.2d at 175 (quoting *Commonwealth v. Patterson*, 405 Pa.Super. 17, 21, 591 A.2d 1075, 1078 (1991)). In this case, the detaining officer had been advised that the suspect carried a weapon. As such, the frisk was justified. *See Interest of S.D.*, 429 Pa.Super. at 581, 633 A.2d at 175 (a patdown frisk incident to a lawful investigatory stop was justified when the detaining officer had been informed by an alleged eyewitness that the suspects were armed). Moreover, the officer also had a reasonable belief that appellee dealt in drugs. Our courts have taken judicial notice of the fact that drug dealers are likely to be armed and dangerous. *Patterson*, 405 Pa.Super. at 22, 591 A.2d at 1078; *Interest of S.D.*, 429 Pa.Super. at 581, 633 A.2d at 175

(an alternative basis for a patdown frisk incident to lawful investigatory stop existed because the detaining officer had a reasonable belief that the suspects were dealing drugs).

As the officer was about to begin the patdown frisk, he noticed inside the opened pouch of appellant's sweatshirt a clear plastic baggie containing off-white chunky substances in clear plastic packets. The warrantless seizure of a piece of evidence which is in plain view is permissible if the evidence is seen from a lawful vantage point and if the incriminating nature of the evidence is immediately apparent to the viewer. *Ellis*, 541 Pa. at 297, 662 A.2d at 1049. "The observing officer must have probable cause to believe the evidence in question is contraband or incriminating evidence." *Id.* We must consider these factors in light of the totality of the circumstances.

We have already determined that the initial stop of appellant was premised on reasonable suspicion to believe that criminal activity was afoot. We have similarly concluded that the patdown frisk incident to the investigatory stop was also justified. Therefore, the officer viewed the plastic bag from a lawful vantage point. Further, the incriminating nature of the plastic baggie and the packets inside that baggie was immediately apparent to the seasoned officer. Consequently, we deem the warrantless seizure of that contraband permissible.

At that point, the officer handcuffed appellee and placed him under arrest. He continued to patdown appellee. After squeezing the bulge he had noticed earlier, he felt "exactly the items that were in [appellee's] sweat jacket pocket." N.T. 3/13/95 at 15. He then retrieved from

that pocket clear plastic baggies containing packets of crack cocaine.

In general, a search conducted without a warrant is presumed to be unreasonable unless justified under a recognized exception to the search warrant requirement. *Commonwealth v. Agnew*, 411 Pa.Super. 63, 74, 600 A.2d 1265, 1271 (1991). A search incident to a lawful arrest is one such exception. *Id.* After discovering a baggie filled with packets of crack cocaine on appellee's person, the officer was warranted in the belief that appellee was committing a crime and thus had probable cause to arrest appellee. Accordingly, the officer properly seized the second bag of crack cocaine packets during the search incident to a lawful arrest.

Order reversed; case remanded. Jurisdiction is not retained.

Del Sole, J., files a dissenting opinion.

DISSENT BY: Del Sole

DISSENT:

DISSENTING OPINION BY DEL SOLE, J.:

Filed July 17, 1996

I dissent. I cannot find sufficient evidence to support a determination that the stop of Appellee was justified.

To justify a stop under *Terry v. Ohio*, 393 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the police must have a reasonable suspicion that criminal activity is afoot. The police must be able to point to specific and articulable

facts which reasonably support that suspicion. *Commonwealth v. Murray*, 460 Pa. 53, 331 A.2d 414 (1975). Reasonable suspicion is viewed under a totality of the circumstances test in which both the content of the officer's information and the reliability of that information are taken into account. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Where a tip is anonymous and its reliability therefore relatively low, the officer must have more information than would be required if the tip were more reliable. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). This court has held that the police must have both suspicious conduct on the part of the person detained and a reasonable belief of some sort of criminal activity. *Commonwealth v. Espada*, 364 Pa.Super. 604, 528 A.2d 968 (1987).

The information which Officer Bey received was second-hand. The senior citizen did not give information directly to the police. Rather, she told a retired police officer who then passed the information along to Officer Bey. The information itself was not specific; the woman stated only that a man whose description fit Appellee was selling drugs at a certain location and was known to carry a gun. Also, the only evidence of the informant's reliability is that she was a concerned citizen. *See Commonwealth v. Dennis*, 417 Pa.Super. 425, 612 A.2d 1014 (1992). Finally, there is absolutely no evidence of suspicious conduct on Appellee's part. He was merely sitting in a chair with his eyes closed, which is certainly not indicative of any criminal activity.

The majority relies primarily on *Interest of S.D.*, 429 Pa.Super. 576, 633 A.2d 172 (1993). I do not find that case to be controlling. Several factors distinguish S.D. from

this case. In S.D., the police received the information directly rather than second-hand and were only fifty feet away when the informant saw the defendant. The stop occurred at 5:25 in the morning, an unusual time to be out on the street, whereas here the stop occurred in early afternoon, a time when one might logically be expected to be sitting outside. Most importantly, however, the court in S.D. reversed the denial of suppression because the scope of the search exceeded that permitted by Terry. The entire discussion of reasonable suspicion, therefore, was not required in order to support the result in that case.

In numerous other cases, this court has held that an anonymous tip, without any suspicious conduct whatsoever and without any corroboration, is insufficient to support even a Terry stop. *See, e.g., Interest of Barry W.*, 423 Pa.Super. 549, 621 A.2d 669 (1993) (radio call of male selling drugs; defendant saw police and fled); *Interest of S.J.*, 425 Pa.Super. 270, 624 A.2d 1068 (1993) (radio call of black female wearing red jacket, blue jeans, red sneakers and curlers in her hair selling drugs at a specific location; police only saw the woman talking to two men). I see no reason for a different result in this case. The only information the police had was that a man answering Appellee's description was selling drugs. The officer observed no suspicious conduct; Appellee was sitting in a chair apparently napping. This does not rise to the level of a reasonable suspicion that criminal activity is afoot. I would affirm the trial court's order suppressing the fruits of the search.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL TRIAL DIVISION
vs.	:	NOVEMBER TERM, 1994
WILLIAM ALLEN	:	NO. 0024

STATEMENT PURSUANT TO RULE 1925
OF THE RULES OF APPELLATE PROCEDURE

(Filed Nov. 14, 1995)

This is an appeal by the Commonwealth from an Order entered in this matter, whereby the defendant's Motion To Suppress physical evidence was granted.

This certifies that Findings of Facts and Conclusions of Law have been filed of record beginning on page **two**, and the reasons for the Order entered may be found beginning on page **six** of the record for **May 12, 1995**.

BY THE COURT
/s/ Levan Gordon
J.
November 14, 1995

[p. 1] **IN THE COURT OF COMMON PLEAS**
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1994
VS.	:	
WILLIAM ALLEN	:	NO. 0024

FINDINGS OF FACT AND CONCLUSIONS OF LAW

May 12, 1995
Courtroom 416, City Hall
Philadelphia, Pennsylvania

BEFORE: THE HONORABLE LEVAN GORDON, J.

APPEARANCES:

MATTHEW PERKS, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
For the Commonwealth

BENJAMIN B. COOPER, ESQUIRE
ASSISTANT VOLUNTARY DEFENDER
Attorney for the Defendant

[p. 2] THE COURT: All right, for the record this is the matter of Commonwealth versus William Allen.

The Court has before it a motion to suppress physical evidence seized from the defendant. Let the record show the defendant is not present today because he is in state custody.

This case was listed prior to today but at request of defense counsel was continued for preparation of briefs and reply. I understand you are prepared to waive the presence of your client.

MR. COOPER: Yes, Your Honor.

THE COURT: All right, findings of facts:

On October 24, 1994 at approximately 1:25 PM Philadelphia Police Officer Kyle Bey assigned to the 22nd Police District received information from one Grixby Stevens who works with senior citizens with regard to certain drug activity. That Mr. Stevens is a retired Philadelphia Police Department lieutenant and has only formerly worked for the 22nd [p. 3] Police District. That Mr. Stevens was known to Officer Bey.

That Stevens informed Bey that drugs were being sold by a heavyset middle-aged male known as quote, Mookie, end of quote, out of a house located at 2128 North Latona Street in Philadelphia. That Mr. Stevens further stated that Mookie is known to also carry a gun.

That Stevens told Bey that a senior citizen lives in the house in which Stevens asserted the drugs were being sold. That Stevens told Bey that he received this information from a senior citizen with whom he worked.

Strike that. About work with whom he provides services for whom he provides services.

That Stevens told Bey that the senior citizen is allowing the drugs to be sold out of her house, not by herself, but by Mookie. Stevens further stated that drugs were also being sold on the street in front of the residence.

That [p. 4] Bey testified that the 21 hundred block of Latona Street was known as a high drug traffic area.

That Officer Bey based upon Stevens' description stated the associate's name of the defendant as a person he had come in contact with on a prior occasion. That Bey indicated that he was familiar with the 21 hundred block of Latona Street because he and his partner had come into contact with drug sales on the street; that Bey testified he had never made any arrests on the block.

That based upon the information acquired from Stevens Bey and his partner Officer Craig Noll rode to the 21 hundred block of Latona Street and to the residence of 2128 North Latona along with Mr. Stevens.

That as the officers entered the block they observed a male whom they believed to be the defendant, sitting on the sidewalk in a chair with his hands folded, leaning back with his head down, [p. 5] and his eyes appearing to be closed, outside of the property at 2128 North Latona Street.

That Officer Bey approached the defendant and observed a large bulge in his left pants pocket. That Bey told the defendant to get up and put his hands on the wall. The the defendant complied with Officer Bey's request.

That Officer Bey observed a clear plastic baggie which contained off-white chunky substance inside a clear plastic bag – strike inside clear plastic packet – inside the flared front pocket of the defendant's sweat-shirt. The defendant was handcuffed and searched.

That upon searching the defendant Bey retrieved from the defendant's pants pocket clear and multicolored packets which contained rocklike substance also alleged to be crack-cocaine. That the defendant was subsequently arrested. That the drugs were placed on a property receipt number [p. 6] 1496809.

Conclusions of law: Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent individual in believing that an offense was committed, that the defendant has committed it.

The courts consider all the factors in the total effect did not concentrate on each element. They focus on the circumstances as seen through the eyes of the trained officer do not view the situation as an average citizen might.

The courts when dealing with probable cause are not dealing with certainties. Instead they're dealing with the factual and practical considerations of every day life on which reasonable and prudent men act, where he motions to suppress, and find the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible.

[p. 7] Probable cause is based on the finding of the probability for the prima facie showing of criminal activity sometimes completely lacking in indicia of reliability to either warrant no police response or require further investigation before a forcible stop of suspect will be authorized.

A police officer may, for example, detain a person if he observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot. The level of suspicion required for a Terry Stop is less demanding than one for probable cause.

Reasonable suspicion, like probable cause, is dependent upon both content of information possessed by the police and its degree of reliability. Both factors quantity and quality are considered and the totality of the circumstances.

Informant reliability may be established by the corroboration of [p. 8] another source such as an additional informant, where initial impetus or service on the informant type information gathered by the arresting officers can be used to sustain a finding of probable cause for a suspect that could not be accurately supported by the tip alone.

The additional information acquired by the officers must be in some sense corroborative of the informant's tip that the arrestee committed the felony or were in the process of committing a felony. In determining prior probable cause prior knowledge of the suspect is one factor; however, more is needed.

The question before this Court is whether or not the facts in this case provided a source for Mr. Stevens' information to lead Officer Bey to believe in the arrest of this defendant.

We conclude that the information supplied to Officer Bey was skeletal as to the specifics about dates, times and

the consistency of this alleged [p. 9] drug activity. The facts do not establish that Officer Bey independently corroborated this information. The fact that Bey knew the alleged defendant from a prior contact alone is not sufficient to establish probable cause.

The facts do not establish the basis of Bey's prior contact with the defendant to determine where, when and why the contact occurred and whether it was in conjunction with his profession.

Officer Bey could not solely rely on the information by Mr. Stevens as a basis to stop the defendant. There was no independent corroboration of Stevens' information. There was no surveillance of the alleged illegal drug activity. Upon receiving information the officers went directly to the scene and detained and ultimately arrested the defendant.

The facts do not establish that Stevens personally observed drug activity either inside or outside of the residence at 2128 North Latona Street. Stevens did not supply any information that he had [p. 10] any personal knowledge of the information that he provided.

The informant's information as given to Stevens was at best uncorroborated hearsay which rose to a level of suspicion that suggested criminal activity had been or might be afoot. There was no evidence presented indicating that the informant had ever seen the defendant engage in any illegal activity.

Despite the informant's tip, there were no other available facts to support the reasonable suspicion to

detain, frisk and ultimately arrest the defendant upon the site.

Our courts have held that it is not always necessary for a police officer to observe activity but you must look at the facts of each particular case to determine if that requirement is to be waived.

The Commonwealth cites the case of in re petition of SD 633 Atlantic 2.d, [sic] 8172, where there although officer did [p. 11] not conduct any surveillance, the arrest, the stopping of the defendant was upheld, though we can distinguish that case from this case.

In that case the informant gave a police officer's information on the street and indicated that the perpetrators were dealing in drugs, and were approximately 50 feet away when the informant saw these individuals. Upon going to the scene the officers found the individuals in the area where the informant said they were, and this was 5:25 AM in the morning. There were no other people on the street.

And the Court said there that the time and place of the encounter between the officer and the suspect may be significant.

In our case this occurred in the afternoon during daylight hours. The information was that someone was selling drugs out of the house and on the street. Upon approaching this defendant he was sitting in a chair by a wall, head [p. 12] back and presumably napping.

Officer Bey in our opinion had no basis for a Terry stop at that particular moment, had no basis for probable cause to arrest the defendant. We believe this case falls

for this line with the appeal of SJ rather than the mundane matter of SD. SJ is decided by the superior court on May 11, 1993.

Based on the foregoing conclusions the defendant's actions on October 24, 1994 did not suggest that he at that time of detention was currently or had previously engaged in any illegal drug activity or to warrant an investigative stop of him.

Therefore, based on the foregoing the Court finds there was no basis to stop this defendant either based on a Terry stop or there was any probable cause to approach this defendant. And based on that defendant's motion to suppress the evidence will be granted.

Now to wit this 12th day of May 1995 the defendant William Allen's motion [p. 13] to suppress the physical evidence is granted.

MR. COOPER: Thank you, Your Honor.

Do you want a 30 day date?

MR. PERKS: Yes, sir. I believe our prosecution has been terminated or substantially hindered by that ruling.

THE COURT: Okay, 6/16.

(Whereupon the proceedings were adjourned for the day).

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(2)

Supreme Court, U.S.
FILED
JUN 28 1999
CLERK

NO. 98-1910

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA

VS.

WILLIAM ALLEN - RESPONDENT

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis*.

[x] Petitioner has previously been granted leave to proceed in *forma pauperis* in the following court(s):

All Pennsylvania Courts

[ ] Petitioner has not previously been granted leave to proceed in *forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

William Allen
(Signature)

29 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

I, William Allen, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes____ No 4

   a. If the answer is yes, state the amount of your salary or wages per month and given the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. 1985 200.00 MONTH

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes____ No X

3. Do you own any cash or have a checking or savings account? Yes____ No X

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

   a. If the answer is yes, state the total value of the items owned.

5. List the persons who are dependent upon you for support and state your relationship to those persons. 0

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 23, 1999.

William Allen
(Signature)

NO. 98-1910

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA

V.

WILLIAM ALLEN,
Respondent

BRIEF IN OPPOSITION TO THE COMMONWEALTH OF PENNSYLVANIA'S PETITION FOR A WRIT OF CERTIORARI

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
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June, 1999

QUESTIONS PRESENTED

1. Should the Petition for Writ of Certiorari be denied because the state court's judgment rests on adequate and independent state grounds, namely Article I, Section 8 of the Pennsylvania Constitution?

2. Should the Petition for Writ of Certiorari be denied because the Pennsylvania Supreme Court's judgment correctly interpreted and applied the jurisprudence of this Court?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table Of Authorities	iii-iv
Statement Of Jurisdiction	1
Constitutional And Statutory Provisions Involved	1-2
Statement Of The Case	2-4
Argument	5-21
I. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT'S DECISION RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.	5-14
II. THIS COURT SHOULD ALSO DENY THE PETITION FOR WRIT OF CERTIORARI AS THE PENNSYLVANIA SUPREME COURT'S JUDGMENT CORRECTLY INTERPRETED AND APPLIED THE JURISPRUDENCE OF THIS COURT.	15-21
Conclusion	22

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412 (1990) . 18, 19

Herb v. Pitcairn, 324 U.S. 117 (1945) 5

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) . 18

Michigan v. Long, 463 U.S. 104 (1983) 5, 14

New York v. Belton, 453 U.S. 454 (1981) 11

Pennsylvania v. Labron, 518 U.S. 938, 116 S. Ct. 2485, 135 L. Ed. 2d 1031 (1996) 11

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) . . . 7, 16, 19

United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675 (1985) 17, 18

Whiteley v. Warden, 401 U.S. 560, 91 S. Ct. 1031 (1971) . 16

STATE CASES

Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) . 12

Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) 10, 11, 12

Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068 (1997) 6, 8, 9, 10, 15, 19

Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969) . 9

Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997) 10

Commonwealth v. Kilgore, 437 Pa. Super. 491, 650 A.2d 462 (1994) 12

Commonwealth v. Kilgore, 544 Pa. 439, 677 A.2d 311 (1995) 11

Commonwealth v. Kilgore, 547 Pa. 346, 690 A.2d 229 (1997) 12

Commonwealth v. Kilgore, 719 A.2d 754 (Pa. Super. 1998) . 12

Commonwealth v. Labron, 547 Pa. 344, 690 A.2d 228 (1997) . 11, 14

(Continued) **TABLE OF AUTHORITIES**

Commonwealth v. Martin, 534 Pa. 136, 626 A.2d 556 (1993) . 12

Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993) . 11, 12, 13

Commonwealth v. Matos, 672 A.2d 769 (1996) 12

Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226 (1996) 6, 7

Commonwealth v. Rodriquez, 532 Pa. 62, 614 A.2d 1378 (1992) 9

Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 (1983) . 10

Commonwealth v. White, 543 Pa. 45, 669 A.2d 896 (1995) . 11

STATEMENT OF JURISDICTION

This Court is without jurisdiction to hear the case at bar because the decision of the Pennsylvania Supreme Court rests upon adequate and independent state grounds, namely, Article I, Section 8 of the Pennsylvania Constitution. In addition, the Pennsylvania Supreme Court properly analyzed and applied the rulings of this Court in issuing a decision that is legally correct and consistent with Federal law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourth and Fourteenth Amendments of the United States Constitution, set forth in the Commonwealth of Pennsylvania's Petition for Writ of Certiorari, this case involves Article 1, Section 8 of the Pennsylvania Constitution, and Rule 323(h) of the Pennsylvania Rules of Criminal Procedure, 18 Pa. C.S.

Article I, Section 8 of the Pennsylvania Constitution provides:

> **Security from searches and seizures**
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Rule 323 of the Pennsylvania Rules of Criminal Procedure, which governs the procedure for motions to suppress evidence and hearings on such motions, states in pertinent part:

> (h) The Commonwealth shall have the burden of going forward with the evidence and of

> establishing that the challenged evidence was not obtained in violation of the defendant's rights. . . .

STATEMENT OF THE CASE

Petitioner, the Commonwealth of Pennsylvania, seeks certiorari by mischaracterizing the Pennsylvania Supreme Court's decision in this case, claiming that the Court held that a tip of a man with a gun "is not material" or "significant" to the question of whether a Terry stop is permitted. This misreading by the petitioner is inaccurate and misleading and does not warrant review by this Court.

While recognizing that this Court in Terry v. Ohio, had already factored the "armed and dangerous" component into the reasonable suspicion equation, the Pennsylvania Supreme Court considered the totality of the circumstances, including the nature of the tip and the information contained therein. The fact that the subject of the tip was alleged to be carrying a gun (where no gun was seen or seized) is merely another allegation and it supplies no reliability or basis of knowledge where there was none before.

Under the totality of the circumstances, the Court ruled that the illegal detention and seizure of evidence was conducted without reasonable suspicion as it was based on an unsubstantiated and uncorroborated tip, for which the source, veracity, reliability and basis were never established.

Respondent, William Allen was arrested and charged with violations of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act. Respondent moved to suppress the physical evidence (alleged crack cocaine) seized from him in violation of his federal and state constitutional rights. At the motion to suppress hearing, Police Officer Kyle Bey testified that he spoke to Mr. Grixbie Stephens at the 22nd District Police Station (App. 3-4).[1] Mr. Stephens conveyed information that he had allegedly received from an unnamed senior citizen that a heavyset, middle aged man named "Mookie" was known to sell drugs and have a gun at 2128 North Natrona Street in Philadelphia. No clothing description was provided, the source of Mr. Stephens' information was not disclosed, and the factual basis for concluding that "Mookie" was selling drugs and carried a gun was not given. Officer Bey stated he associated the name and description with respondent because of some undescribed prior contact (App. 3-4).

Based on the above, Officer Bey went to 2128 North Natrona with Mr. Stephens. Respondent was observed on the sidewalk sitting in a chair neutrally between the house located at 2128 North Natrona Street and an abandoned property, with his arms folded across his chest, head down, eyes closed, and an undescribed "bulge" in his pants pocket (App. 3). Officer Bey ordered respondent to stand up, turn around, walk to a wall 5 feet away, spread his feet, and place his hands on the wall. Respondent complied with the order. Officer Bey then placed one foot between

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[1] App. refers to the Appendix to Petitioner's Writ.

appellant's feet which were spread apart and straddled petitioner with his other foot. At this point, Officer Bey had not yet observed anything unusual or suspicious about appellant or his behavior. After appellant was secured, Officer Bey noticed a clear baggie with numerous clear packets inside the flared front pocket of appellant's sweatshirt (App. 3). Appellant was handcuffed and searched. Two bags of drugs were seized along with money (App. 3).

Judge Levan Gordon of the Philadelphia Court of Common Pleas granted the motion and suppressed the evidence seized holding, *inter alia*, that the information supplied to the officer was "skeletal as to the specifics about dates, times and the consistency of this alleged drug activity" and that there was no "independent corroboration" by the officer (App. 37).

Following an appeal from the suppression order by the prosecution, a divided panel of the Superior Court of Pennsylvania (App. 17-30) reversed the suppression order. The Supreme Court of Pennsylvania granted discretionary review and, on February 26, 1999, reversed the Superior Court and reinstated the original suppression order. The Pennsylvania Supreme Court accepted the suppression judge's findings, and agreed with his reasoning (App. 7-11), ruling that, after considering the totality of circumstances, the baselessness and unreliability of the tip, failed to rise to the level of specific and articulable reasonable suspicion, and the resultant seizure violated both the Pennsylvania Constitution and the Federal Constitution (App. 7-11).

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT'S DECISION RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should deny the Petition for Writ of Certiorari because the Pennsylvania Supreme Court's judgment rests upon adequate and independent state grounds which undermine the jurisdiction of this Court. Michigan v. Long, 463 U.S. 104 (1983); Herb v. Pitcairn, 324 U.S. 117, 126 (1945). In Michigan v. Long, this Court held that it will not review a state court judgment when it is clear from the state court's opinion that the judgment rests upon adequate and independent state grounds. A clear, adequate and independent state ground exists in this case in the form of Article I, Section 8 of the Pennsylvania Constitution.

In Michigan v. Long, the state court had cited the Michigan Constitution in the course of its opinion, but this Court held that the passing references were not sufficient to establish an adequate and independent state ground. This Court noted that the state court had only twice cited its state constitution, but had cited no state cases to support the conclusion that the search was unconstitutional on the state ground. Moreover, the state court had relied exclusively upon an interpretation of Supreme Court and federal cases. Under these circumstances, it appeared to this Court that the Michigan court felt compelled to reach the result it did because of its interpretation of federal law.

That plainly is not the case here. Although reaching the same result under both the state and federal constitutions, the

Pennsylvania Supreme Court's decision in this case does not suggest in any way that its consideration of the state constitution was secondary to, contingent upon, or compelled by its understanding of federal law.

In holding that an unsubstantiated and uncorroborated tip, for which the source, veracity, reliability and basis of knowledge were never established, did not supply sufficient information to raise a reasonable suspicion that petitioner was engaged in criminal activity, the Pennsylvania Supreme Court specifically referred to the state constitution as well as state cases, stating:

> The Fourth Amendment to the United States Constitution, and Article 1, Section 8 of the Pennsylvania State Constitution require that police officers have within their knowledge "specific and articulable facts" raising a reasonable suspicion that criminal activity is afoot before they conduct an investigatory stop of an individual. See, e.g., Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 228-29 (1996) (discussing federal and state constitutional constraints on police investigatory stops recognized in Terry v. Ohio, 391 U.S. 1, 88 S.Ct. 1868 (1968), and Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969)). We find that, considering the totality of the circumstances, Officer Bey did not have within his knowledge "specific and articulable facts" raising a reasonable suspicion that appellant was currently engaged or about to engage in criminal activity at the time of his investigatory stop. Because the physical evidence seized from appellant's person was obtained by contravening his rights under the Fourth Amendment to the Federal Constitution and Article 1, Section 8 of the Pennsylvania State Constitution, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

More importantly, the Pennsylvania Supreme Court based its holding on Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068

(1997), a case decided solely under the Pennsylvania Constitution.

In it's petition to this Court the Commonwealth of Pennsylvania is ostensibly requesting that this Court overrule Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) or in the alternative, create an exception to Terry where a tip to police involves a man possessing a gun.

These issues have already been considered and decided adversely to the Commonwealth by the Pennsylvania Supreme Court in Commonwealth v. Hawkins, supra, which clearly, unequivocally and expressly did so on independent state grounds. Again, in deciding the case the Commonwealth now seeks to bring before this Court, the Pennsylvania Supreme Court relied heavily on Hawkins.

In the Hawkins case, the Court was requested to determine whether a police radio broadcast that a man of a particular description is carrying a gun may serve as the justification for a search of that person and the seizure of the gun he is carrying when the arresting officer is unable to authenticate the telephone message on which the radio broadcast was based or provide an independent basis for the stop and frisk. In holding that it did not, the Court specifically cited the Pennsylvania constitutional provision at issue, quoting it in its entirety, referring to it many times, and noting how and why the Pennsylvania Constitution should be interpreted differently from the federal constitution, as it explained how the Commonwealth's theory ran afoul of the expansive rights embodied in the state constitution:

> Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 230 (1996) makes it clear that the

> requirements of Terry are also the requirements of **Art. I, §8 of the Pennsylvania Constitution**, and we decide the present case on the basis of **Art. I, §8 of the Pennsylvania Constitution**, which provides:
>
> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

547 Pa. at 656 n.2.

The Court went on to reject in no uncertain terms the Commonwealth's theory of a "man with a gun exception" stating:

> The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before. And since there is no gun exception to the Terry requirement for reasonable suspicion of criminal activity, in the typical anonymous caller situation, the police will need an independent basis to establish the requisite reasonable suspicion.
>
> The Commonwealth takes the radical position that police have a duty to stop and frisk when they receive information from any source that a suspect has a gun. Since it is not illegal to carry a licensed gun in Pennsylvania, it is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. **Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes -- which it does not** -- such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.

547 Pa. at 657.[2]

In summing up, as to make no mistake as to what the basis of it's ruling was, the Court stated:

> Contrary to the Commonwealth's view, the public will receive its full measure of protection by police who act within the **restraints imposed on them by Art. I, §8 of the Constitution of Pennsylvania** and this court's relevant caselaw. Upon receiving unverified information that a certain person is engaged in illegal activity, the police may always observe the suspect and conduct their own investigation. If police surveillance

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[2] On the basis of Article I, §8 of the Pennsylvania Constitution, the Pennsylvania Supreme Court has steadfastly resisted any efforts to broaden the narrow scope of Terry. In Commonwealth v. Rodriquez, 532 Pa. 62, 614 A.2d 1378 (1992), this Court noted:

> We emphatically reject the Superior Court's "ends justify the means" analysis. By focusing its attention only upon the serious ills inflicted upon society by illegal narcotics, the Superior Court failed to recognize and respond to necessary constitutional constraints on excessive police conduct. The seriousness of the criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause.
>
> Accordingly, we decline to adopt the rationale of the Superior Court or the arguments offered by the Commonwealth, and thus, we decline to expand the appropriately narrow "reasonable suspicion" exception to probable cause already established by the United States Supreme Court in Terry v. Ohio, and by this Court in Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

Id. at 1383.

> produces a reasonable suspicion of criminal conduct, the suspect may, of course, be briefly stopped and questioned (the Terry investigative stop), and, if the officer has reasonable fear for his safety, police may pat down the suspect's outer garments for weapons.

547 pa. at 657-8.[3]

Article I, §8 of the Pennsylvania Constitution both predates the Fourth Amendment to the federal Constitution and, the Pennsylvania Supreme Court has consistently held, that it confers greater rights than its federal counterpart, particularly in the area of individual rights to privacy. As the Pennsylvania Supreme Court has noted, the state-based "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment." Commonwealth v. Sell, 504 Pa. 46, 63, 470 A.2d 457, 466 (1983).

The State Supreme Court found that the Pennsylvania provision "is meant to embody a strong notion of privacy, carefully guarded in this Commonwealth for the past two centuries":

> As we stated in Sell: "the survival of the language now employed in Article I, §8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth. [Citations omitted.]

Commonwealth v. Edmunds, 526 Pa. 374, 394, 586 A.2d 887, 897 (1991).

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[3] While Hawkins is a plurality decision, the principles of Hawkins were later reaffirmed by the full court in Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997).

Although the texts of Article I, §8 and the Fourth Amendment are similar, "the protections afforded by the two constitutions are not identical." Commonwealth v. Mason, 535 Pa. 560, 569, 637 A.2d 251, 256 (1993); accord Edmunds, 526 Pa. at 391, 586 A.2d at 895-896 (although Article I, §8 and Fourth Amendment similar, court not "bound to interpret" them identically). The federal and state provisions serve diverging purposes which have, in turn, given rise to a distinction in the scope of the exclusionary rule in its federal and state applications.

Any suggestion that the Pennsylvania Supreme Court felt bound by federal constitutional law to render a decision in this case which it would not otherwise have rendered is belied by a host of recent Pennsylvania decisional law explicating Article 1, Section 8: its distinct analytical differences from the Fourth Amendment, and the broader protections provided to citizens by it, including Commonwealth v. Labron, 547 Pa. 344, 690 A.2d 228 (1997) which rejected New York v. Belton, 453 U.S. 454 (1981), and held, after a summary reversal by this Court,[4] that as a matter of state

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[4] Labron, along with two other cases raising the same issue, Commonwealth v. Kilgore, 544 Pa. 439, 677 A. 2d 311 (1995) and Commonwealth v. White, 543 Pa. 45, 669 A. 2d 896 (1995), were originally decided adversely to the Commonwealth by the Pennsylvania Supreme Court in 1995. White was clearly decided on State Constitutional grounds. The Labron and Kilgore opinions were somewhat ambiguous and the Commonwealth filed Petitions for Writ of Certiorari with this Court seeking review. In Pennsylvania v. Labron, 518 U.S. 938 , 116 S.Ct. 2485, 135 L.Ed. 2d 1031 (1996), this Court summarily reversed Labron and Kilgore, remanding those cases back to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court reaffirmed its decision in Labron, at Commonwealth v. Labron, 547 Pa. 344, 690 A. 2d 228 (1997), clearly indicating that its decision was based on the Pennsylvania Constitution, which

(continued...)

constitutional law the "automobile exception" requires both probable cause and exigent circumstances to justify a warrantless search. See also Commonwealth v. Matos, 672 A.2d 769 (1996) (rejecting California v. Hodari. D., 499 U.S. 621 (1991), under Article I, Section 8); Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993) (refusing to apply under Article I, Section 8, the "inevitable discovery doctrine" as applied in Segura v. United States, 468 U.S. 796 (1984); Commonwealth v. Martin, 534 Pa. 136, 626 A.2d 556 (1993) (dog sniff, deemed not to be a search under federal law, held to be a search requiring probable cause under Article I, Section 8); Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) (rejecting United States v. Leon, 468 U.S. 897 (1984), refusing to find a "good faith exception" to the exclusionary rule in Pennsylvania, and determining that Pennsylvania's exclusionary rule is constitutionally mandated, not supervisory); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) (declining to follow United States v. Miller, 425 U.S. 435 (1976), under Article I, Section 8).

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[4](...continued)
claim White's counsel had preserved in the courts below and argued in the Pennsylvania Supreme Court.

As counsel for Kilgore had not properly preserved the State Constitutional issue, the Pennsylvania Supreme Court entered and order affirming the Pennsylvania Superior Court's original order denying relief, Commonwealth v. Kilgore, 437 Pa. Super. 491, 650 A. 2d 462 (1994), affirming Kilgore's conviction and sentence, Commonwealth v. Kilgore, 547 Pa. 346, 690 A. 2d 229 (1997). This was not, however, the end of the story for Mr. Kilgore. In Commonwealth v. Kilgore, 719 A. 2d 754 (Pa. Super. 1998), the Court ordered suppression and a new trial. holding that Kilgore's attorney had been ineffective in failing to preserve the State Constitutional issue.

As described and interpreted by the Pennsylvania Supreme Court, Article I, Section 8 gives stronger recognition to the privacy interests of Pennsylvania's citizens; those privacy interests weigh more heavily in the balance against the needs of law enforcement than is the case under the Fourth Amendment. In Commonwealth v. Mason, 435 Pa. at 571 n.3, 637 A.2d at 251 n.3, Justice Flaherty wrote for the Pennsylvania Supreme Court:

> Upon reflection, it is apparent that in the context of the Fourth Amendment, when a court deters police misconduct, it necessarily also safeguards privacy and the probable cause requirement. Why would a court deter police misconduct at all if not to deter police from improperly invading the right of persons to be secure, i.e., private, in their persons, houses, papers, and effects? Deterring police misconduct is not an end in itself. The ultimate distinction, then, between the federal and the Pennsylvania analysis is not that the federal courts seek only to deter police misconduct and the Pennsylvania courts seek to protect certain rights, but that the federal courts place less importance than do we on the right of privacy. Therefor, they balance the interests differently and reach a different conclusion as to the relative importance of privacy as against securing criminal convictions. (emphasis added).

From all of the above, it is clear that Pennsylvania's references to the State Constitution in the case at bar reflect an adequate and independent state ground for the Pennsylvania Supreme Court's decision. As interpreted and applied by Pennsylvania's high court, Article I, Section 8 is both separate and independent from federal law. In the context of search and seizure claims generally, and in the context of the reasonable suspicion standard in stop and frisk cases in particular, the state's reliance upon

Article I, Section 8 reflects a distinct basis for relief that is different from its federal counterpart. It would thus be unfair and inaccurate to conclude that the Pennsylvania Supreme Court "decided the case the way it did because it believed that federal law required it do so." Michigan v. Long, 463 U.S. at 1041. Rather, Pennsylvania's decisional law and Article I, Section 8 were recognized to provide an independent basis for concluding that Article I, Section 8 had been violated by the search in this case.

This Court stated in Herb v. Pitcairn, and reiterated in Michigan v. Long, that

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected our views of federal laws, our review could amount to nothing more than an advisory opinion."

Michigan v. Long, 463 U.S. at 1042 (quoting Herb v. Pitcairn, 324 U.S. at 126). See also, Commonwealth v. Labron, 547 Pa. 344, 690 A.2d 228 (1997) where the state court reaffirms its original judgment on independent state constitutional grounds after this Court reversed and remanded after ruling that there was no violation of the Fourth Amendment to the United States Constitution. That is precisely the situation here. An adequate and independent state ground exists, and this Court should deny the Petition for Writ of Certiorari.

II. THIS COURT SHOULD ALSO DENY THE PETITION FOR WRIT OF CERTIORARI AS THE PENNSYLVANIA SUPREME COURT'S JUDGMENT CORRECTLY INTERPRETED AND APPLIED THE JURISPRUDENCE OF THIS COURT.

This Court should deny the Commonwealth's Petition as the Pennsylvania Supreme Court contrary to petitioner's suggestion, never misinterpreted, misread or misapplied the caselaw by this Court dealing with the reasonable suspicion standard in the stop and frisk context.

Respondent was subjected to a constitutionally impermissible detention and seizure when police awoke him, as he was sleeping in a chair and ordered him to assume the classic arrest position against a wall, so that they could conduct an exploratory search.

This police action was viewed by the Pennsylvania Supreme Court as an illegal detention and seizure of evidence conducted without reasonable suspicion, since it was based on an unsubstantiated and uncorroborated anonymous tip, for which the source, veracity, reliability and basis were never established.

Petitioner seeks to change the focus of the Pennsylvania Supreme Court's holding in another attempt to bang it's "man with a gun exception to Terry v. Ohio" drum, which was unconditionally silenced by the Pennsylvania Supreme Court in Commonwealth v. Hawkins, supra.

This case is not a "man with a gun" case, as no weapon was ever seen or seized. The suppressed evidence in fact turned out to be a controlled substance. Rather, what this case is about is the

reliability of the tip, the basis of knowledge of the tipster, and the lack of justification presented for a stop and frisk.

The Federal law is well established that a police officer may, in appropriate circumstances, stop a person for the purpose of investigating possible criminal behavior, even though there is no probable cause for an arrest, as long as the officer has reasonable suspicion that the person is engaged in criminal activity. See Terry v. Ohio, 392 U.S. 1, 19-23, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The circumstances may even require a frisk of the person to determine whether the person is carrying a weapon, if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. See id. at 27. However, when the police act on the information of an informant, the reliability of that information must be established before a citizen can be stopped and frisked.

This Court has consistently rejected the position that a tip from an unknown source can alone justify a detention unless a reliable basis for the tip is shown or an independent investigation corroborates the reliability of that information. In Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971), this Court held that it is the prosecution's burden to establish the underlying basis for a radio call if it intends to use its contents to provide support for an arrest. At issue there was the lawfulness of an arrest based on a radio bulletin alleging that two persons of specific description were wanted for breaking and entering a business establishment. The officer who issued the bulletin had obtained an

arrest warrant. However, the arrest warrant was not properly based upon probable cause.

The Court rejected the claim that the arresting police were entitled to rely upon the radio bulletin, if the officer issuing the bulletin lacked probable cause. The Court wrote:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

91 S.Ct. at 1037.

The Whiteley rule was extended to cover investigatory stops in United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985), where this court held that a stop and frisk may be supported by an otherwise anonymous police radio bulletin only if evidence is offered at the suppression hearing to establish that the police officer who issued the radio bulletin had a basis for concluding that there was a reasonable suspicion that the individual described or named was involved in criminal activity and was armed and dangerous. The Court wrote:

> Assuming the police make a Terry stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop, United States v. Robinson, [536 F.2d 1298 (1976)],

> and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department.

United States v. Hensley, 469 U.S. at 233, 105 S.Ct. at 682.

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), this Court recognized that anonymous tips were inherently unreliable. In that case, however, this Court found that the subsequent investigation by the police, which corroborated the informant's predictions of the suspect's future behavior, was so extensive as to provide the reliability otherwise lacking.

In Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990) this Court continued to proclaim the inherent unreliability of unverified anonymous tips:

> ... the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown and unknowable' ... the anonymous tip ... provides virtually nothing from which one might conclude that (the caller) is either honest or his information reliable.

110 S.Ct. at 2415.

The Court continued:

> [A]s we said in Adams [v. Williams, 407 U.S. 143 (1972)]: 'Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.' 407 U.S., at 147, 92 S.Ct. at 1924. Simply put, a tip such as this one, standing alone, would not 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate.'

Alabama v. White, supra, 110 S.Ct. at 2416. Nevertheless, the majority in White found that sufficient corroboration of the tip may overcome the unreliability. There, because the informant was

able to accurately predict the future behavior of the suspect (i.e., when she would leave her apartment, the type of car she would enter, and the destination to which she would drive), the majority concluded that, "although it is a close case," the investigatory stop was justified. Id., 110 S.Ct. at 2417.

Unlike the circumstances in White, the tip here contained no information as to what respondent was doing, where he was coming from, where he was going, how long he had been there, how the individual "knew" he was armed - he wasn't - or anything at all to show the informant had some intimate knowledge of the actions of the man. Absent any prediction of future behavior, the arresting officers were left only with a general description including a nickname and a location, and the Pennsylvania Supreme Court held that this was not enough under either the Pennsylvania Constitution or, relying on White; Gates; and Terry,[5] the United States

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[5] Petitioner's myopic proposition that the Pennsylvania Supreme Court's holding that a tip that a man has a gun "is not material" (petitioner's brief p. 3) or "significant" (petitioner's brief p. 5) to the question of whether a Terry stop is permitted is inaccurate, and misleading for many reasons. First, it must be remembered that this Court in Terry v. Ohio, supra had already factored the "armed and dangerous" component into the reasonable suspicion equation, when it carved out a limited exception to the probable cause requirement.

Secondly, the Court considered, as it must under Terry, Illinois v. Gates, and Alabama v. White, the totality of the circumstances including the nature of the tip and the information contained therein.

Thirdly, the Court in relying on Commonwealth v. Hawkins, supra correctly reasoned that the fact that the subject of the tip was alleged to be carrying a gun is merely another allegation and it supplies no reliability or basis of knowledge where there was none before.

Constitution:

> Having reviewed the testimony provided at the suppression hearing, the trial court's Findings of Fact and Conclusions of Law, and the Superior Court's opinion reversing the suppression of the drugs found on appellant, we conclude that at the time of the initial Terry stop, Officer Bey did not possess sufficient information to raise a reasonable suspicion that appellant was currently engaged in criminal activity. Officer Bey offered no indication in his testimony at the suppression hearing that Stephens had given him any information concerning when appellant was alleged to have sold drugs at 2128 North Natrona Street, or with what regularity and frequency he was selling drugs there. In addition, Officer Bey's testimony fails to establish whether or not Stephens told him the specific basis of the knowledge concerning the drug activity. The trial court found that Stephens told Bey that he received his information concerning the drug dealing at 2128 North Natrona Street from a senior citizen for whom he provided services. Bey's testimony provides no indication that Stephens told him how the senior citizen who gave him his information knew that "Mookie" had been selling drugs and carrying a gun at 2128 North Natrona Street. Therefore, the trial court correctly concluded that Officer Bey was unaware of the specific basis of knowledge of the senior citizen who gave the information concerning "Mookie" to Stephens. The skeletal information provided to Officer Bey by Stephens, combined with the mere fact that appellant was sitting, apparently asleep, outside of 2128 North Natrona Street upon Bey's arrival, simply fails to support the Superior Court's conclusion that Officer Bey had a reasonable suspicion that appellant was currently engaged in criminal activity at that time.

725 A.2d at 741-742.

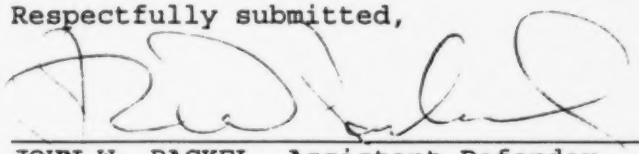
In ruling that the illegal detention and seizure of evidence was conducted without reasonable suspicion as it was based on an unsubstantiated and uncorroborated tip, for which the source,

veracity, reliability and basis were never established, the Pennsylvania Supreme Court properly analyzed and applied the leading cases of this Court on the subject, while issuing a decision that is legally correct and consistent with Federal law.

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,



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Supreme Court, U.S.
FILED
JUL 6 1999
OFFICE OF THE CLERK

No. 98-1910

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM ALLEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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6pp

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to consider the ruling of the Pennsylvania Supreme Court in this case, which treats information that a suspect is carrying a gun as irrelevant to the reasonable suspicion analysis under *Terry v. Ohio*?

2. Does respondent's argument, that it is a correct reading of *Terry* to hold that a report of a gun is irrelevant, recommend denial of the petition for certiorari?

REASONS FOR GRANTING THE WRIT

Respondent asserts two reasons for denying the writ. First, he claims that the state court actually decided this case under the state constitution, not *Terry*. Second, he argues (somewhat inconsistently) that the state court correctly applied the *Terry* standard. Respondent's first argument is simply incorrect; his second actually calls for granting the writ.

1. This Court has jurisdiction: the state court never asserted an independent state ground, and expressly relied on *Terry*.

The Pennsylvania Supreme Court knows how to state an independent state ground; here it did not. Indeed, this Court recently reiterated the concept directly to that court.

In *Pennsylvania v. Labron*, 518 U.S. 938 (1996), as here, Labron's main argument was jurisdictional; the state court, he claimed, relied on the state constitution. This Court rejected that argument. Although it referred to state jurisprudence, the state court had made no "plain statement" that its numerous citations to federal authority were "being used only for the purpose of guidance, and d[id] not themselves compel the result[.]" 518 U.S. at 940-41.

Labron was decided on July 1, 1996, more than two years before the state court reached the instant case on February 26, 1999. The state court, therefore, obviously knows by now how to articulate an independent state ground. Yet it did not do so.

Instead, the ruling here expressly and repeatedly relies on *Terry* and cases decided under *Terry*. *Terry* is cited no less than four times by the state court, which also cites *Alabama v. White*, 496 U.S. 325 (1990) (applying *Terry*). Where state cases are cited, they are cases that expressly relied on *Terry*. *E.g.*, *Commonwealth v. Hicks*, 434 Pa. 153, 160, 253 A.2d 276 (1969). When the lower court cited *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226 (1996), it added a parenthetical explaining that the relevant point in that case was based on *Terry* (appendix, 7). The lower court makes two references to the state constitution, but treats the state provision as coextensive with the Fourth Amendment (appendix, 10-11) (referring to "The Fourth Amendment to the United States Constitution *and* Article 1, Section 8 of the Pennsylvania State Constitution"; emphasis added). Indeed, the lower court punctuates the reference to the state provision with yet another citation to *Terry* (*Id.*, 10).

In point of fact, respondent does not even *argue* that the *instant* decision contains the required "plain statement." Rather, he argues that *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), the state plurality decision that *let to* the idiosyncratic view of *Terry* embodied in the instant case, contained such a statement (brief for respondent, 7-8).

Respondent's point is a total non-sequitur. For purposes of jurisdiction, to assert that a state court relied on

an independent state ground in *another case* is simply meaningless.[1]

Moreover, if reference to other state decisions were relevant, it would have to be noted that the Pennsylvania Supreme Court has repeatedly held that, in the area of stop and frisk, the state constitution is entirely coextensive with the Fourth Amendment and with *Terry*. *Commonwealth v. Jackson*, 698 A.2d 571 (Pa. 1997); *Commonwealth v. Morris*, 537 Pa. 417, 422 n.3, 644 A.2d 721 (1994); *Commonwealth v. Hicks*, *supra*.

Jackson is particularly significant. In that case a majority of the Pennsylvania Supreme Court adopted the reasoning of the plurality in *Hawkins*; but in *Jackson*, the Pennsylvania Court expressly relied on *Terry*, and held that *Terry* controlled under the state constitution. 698 A.2d at 573 ("Pennsylvania has always followed *Terry* in stop and frisk cases").

Jurisdiction is not in issue here.

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[1] In fact, the supposed assertion of an independent state ground was apparently less than clear in *Hawkins* as well. The Florida Supreme Court later concluded that *Hawkins* was a persuasive application of the Fourth Amendment. *J.L. v. State*, 727 So.2d 204 (Fla. 1998).

This underscores the importance of this Court's "plain statement" requirement. The alleged assertion of a state ground in *Hawkins* was so unclear, and so "interwoven with the federal law," *Labron*, 518 U.S. at 941, that it was read as an authoritative statement of *federal* law by another state court. State courts cannot be allowed to each place their own gloss on the federal constitution, while avoiding review by making ambiguous reference to their own constitutions.

2. Respondent's alternative position is actually an argument *for* granting the writ.

Though he insists that the state court did not purport to follow *Terry*, respondent argues in the alternative that it applied *Terry* correctly.

Petitioner will not debate the question here; it is sufficient to note that the question warrants debate. Indeed, if respondent is correct, the overwhelming majority of states and federal circuit courts that have adopted a view of *Terry* opposite to that of respondent and the supreme courts of Pennsylvania, Florida, and Massachusetts, are all terribly wrong. (*See* petition for certiorari at 12-15, collecting cases). Given respondent's position, grant of the writ is all the more imperative to address this alleged massive misapplication of the Fourth Amendment.

The writ should therefore be granted.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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